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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WENDY C. COLEMAN D/B/A WCC CELLULAR,
JAJ CELLULAR PARTNERSHIP,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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85 pp

QUESTIONS PRESENTED

1. **Whether a federal agency violates a corporation's Fifth Amendment right to due process of law when it:**

   - **Holds the corporation vicariously and strictly liable, to its substantial economic detriment, for the inadvertent prohibited conduct of a minor shareholder, when such conduct was unknown to the corporation and of no benefit to it;**

   - **Provides no explicit advance notice of the scope of the prohibited conduct and the consequences of violation; and**

   - **Permits no opportunity to mitigate or cure the violation.**

2. **Whether the FCC Acted Within Its Statutory Authority in Establishing a Vicarious Liability Rule**

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OPINIONS BELOW

The decision under review is *Florida Cellular Mobil Communications Corp. v. FCC*, 28 F.3d 191 (D.C. Cir. 1994) (App. 1a), *aff'g Florida Cellular Mobile Communications Corp.*, 7 F.C.C.R. 7856 (1992) (App. 18a), *aff'g* 6 F.C.C.R. 6910 (1991) (App. 24a), *aff'g* 6 F.C.C.R. 354 (Mob. Serv. Div. 1991) (App. 29a).

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 15, 1994 (App. 1a, 36a), and rehearing was denied on September 28, 1994 (App. 34a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] The caption reflects all parties to the proceedings in the court below. Florida Cellular Mobil Communications Corporation, an Illinois corporation, is a privately held company and does not have any parent companies or subsidiaries.

CONSTITUTION, STATUTES, AND REGULATIONS

The constitutional provisions, statutes, and regulations involved in this case are: U.S. CONST., Amend. V; 47 U.S.C. § 309; and 47 C.F.R. §§ 22.921, 22.922 (1988). Relevant portions of their texts are set forth verbatim in the Appendix at pages 52a-54a.

STATEMENT OF THE CASE

Florida Cellular Mobil Communications Corporation ("Florida"), seeks a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) affirming decisions of the Federal Communications Commission ("FCC") (App. 18a, 24a, 29a) that disqualified Florida from receiving a valuable license to construct and operate a cellular system in the Southern Maryland and Eastern Shore area known as the "Maryland 2 - Kent" Rural Service Area.

The FCC dismissed Florida's application as "unacceptable for filing" because in December 1988, when Florida's application was filed, Yerger C. Yandell, an 0.85% shareholder in Florida who was unaware that Florida was applying for Maryland-2, owned a 5% partnership interest in another applicant for the same market, without Florida's knowledge. An FCC rule adopted in May 1988, 47 C.F.R. § 22.921(b)(1) (1988), provided that "For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent." (App. 53a.)

Florida notified its shareholders when the rule was adopted. Yandell never received the mailing, however, because he had moved his residence in 1984. He did not notify Florida of his change of address because he believed Florida had previously gone out of business. The first time Florida became aware that Yandell's address was incorrect was in October 1988, several months after the letter concerning the rule change, when a mailing to shareholders about the ongoing FCC application process was returned by the post office, marked "Unable to deliver—no forwarding address." By this point, Yandell had invested in another cellular applicant, believing that Florida no longer existed. (App. 5a-6a.)

In November 1989, Florida Cellular was the winner of the FCC lottery held among the 891 applicants for Maryland-2. Shortly after the lottery, Florida located Yandell. Thereupon, Yandell and Florida discovered that Yandell held interests in two companies applying for the same license. (App. 5a-6a.)

Both Florida and Yandell retained FCC counsel to address the issue of Yandell's dual holdings. On March 9, 1990, their counsel met with the FCC staff to informally disclose Yandell's dual holdings and discuss the consequences. The staff officials' reaction at that meeting was that Yandell's unintentional dual holdings constituted a technical rule violation that was not disqualifying, but might warrant imposing a fine on Yandell. To eliminate the dual holdings, the staff suggested they reach an agreement for Yandell to divest his interest in Florida. (App. 6a; A. 273, 298-99, 301-02.)[2] The staff advised them that in order to divest the interest, a waiver of a different rule, 47 C.F.R. § 22.922(a) (1988) would be required. That rule prohibits any "sale, transfer, assignment or other alienation of any cellular application," including interests therein. (App. 54a.)

On March 26, 1990, the FCC issued a public notice designating Florida as the tentative selectee for the Maryland 2 market, formally accepting its application for filing. On the same day, the FCC staff confirmed that, in the absence of a petition to deny Florida Cellular's application, Yandell's dual interest would not be disqualifying if he divested his interest. (App. 6a; A. 273, 298-99, 301-02.)

On April 24, 1990, Florida filed a letter formally disclosing Yandell's dual interest and sought a waiver of 47 C.F.R. § 22.922(a) to permit the company to repurchase Yandell's stock and eliminate any question concerning compliance with 47 C.F.R. § 22.921(b)(1). Shortly thereafter, a losing applicant, JAJ Cellular Partnership ("JAJ"), filed a petition to deny the application and opposed the waiver request. Florida subsequently filed an executed agreement under which the company would repurchase Yandell's stock at his original purchase price upon grant of a waiver permitting the transfer. (App. 7a.)

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[2] Citations to "App. __" refer to the Appendix to this petition, while citations to "A. __" refer to the Appendix to the briefs filed with the court of appeals.

On January 18, 1991, the FCC staff issued a *Memorandum Opinion and Order* (App. 29a) dismissing the Maryland-2 applications of both Florida and the other company in which Yandell had invested. This brief decision held that because Yandell held interests in two applicants for the same license, Florida's application was in violation of 47 C.F.R. § 22.921(b)(1). The staff's decision said, "No corrective action by the Commission can alter the fact that Florida's application, at the time it was filed, was defective,"[3] and as a result must be "returned to the applicant as unacceptable for filing." (App. 31a-32a.)

Florida petitioned for reconsideration of this decision, which was denied by the FCC in its November 22, 1991 *Memorandum Opinion and Order* (App. 24a.) The FCC agreed with the staff that as a result of Yandell's ownership of conflicting interests, Florida was in violation of the § 22.921(b)(1) and its application was therefore unacceptable for filing. The FCC declined to waive this rule, stating:

> Florida's claim that its violation of Section 22.921 was inadvertently committed by a minority shareholder does not meet [the criteria for waiver]. While Florida itself may not have acted intentionally to skew its chances in the lottery, it has made no showing that it took sufficient affirmative steps to ensure that none of its shareholders had filed another application. A rule such as Section 22.921 could not be efficiently applied if a fact-specific analysis of intent were required in particular cases. This would slow implementation of service to the public, contrary to the public interest. Moreover, inadvertent rule violations are hardly unique. Waiving rules for inadvertent violations would seriously undercut general compliance and enforcement efforts. Administrative efficiency and fundamental fairness to those who comply with the provisions of this rule mandates stringent compliance.

(App. 26a-27a, footnote omitted.)

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[3] The staff relied on 47 C.F.R. § 22.20 (1988), which provides that an application is unacceptable for filing if it is not in compliance with the applicable rules.

Florida again petitioned for reconsideration and again was rebuffed. On December 1, 1992, the FCC issued its *Memorandum Opinion and Order on Reconsideration* (App. 18a), the FCC explicitly held that its rule was a strict vicarious liability rule:

> Our rule requires applicants to avoid cross-ownership interests; it does not exempt those who file multiple applications and fatally err by not diligently tracking their assorted potential cross-interests. . . . The absolute legal prohibition of Section 22.921 against cross-ownership interests explicitly includes indirect interests of less than 1 percent. Nothing in Florida Cellular's petition, including its claim of inadvertence, lends credence to its assertion that it warranted a sua sponte waiver, or should have been granted a waiver on reconsideration.

(App. 22a-23a, footnotes omitted.)

Florida appealed the FCC's decisions to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals affirmed on July 15, 1994. The court agreed with the FCC that Florida could be held responsible for Yandell's conduct:

> Although Mr. Yandell's dual interests caused the violation, the Commission could properly dismiss the application for Florida Cellular's failure to file an application that complied with the FCC rules, an act that was the company's responsibility to perform.

(App. 11a.)

The court held that the FCC did not act arbitrarily and capriciously in dismissing the application as unacceptable for filing, analogizing this case to others in which the FCC has enforced its "technical rules" rigidly "for the purposes of expediting the processing of applications and of providing a quick, simple method of selecting a prospective licensee," citing *Moving Phones Partnership L.P. v. FCC*, 998 F.2d 1051, 1057 (D.C. Cir. 1993) (alien ownership restrictions), *cert. denied*, 114 S.Ct. 1369 (1994); *Russian River Vintage Broadcasting v. FCC*, 5 F.3d 1518, 1521 (D.C. Cir. 1993) (transmitter site information); *Malkan FM Associates v. FCC*, 935

F.2d 1313, 1320 (D.C. Cir. 1991) (antenna height limits). (App. 11a-12a.) It reasoned:

> The Commission's rules and orders put the applicants on notice that their applications would be subject to dismissal for failure to comply with the FCC procedural and substantive rules. . . . Therefore, we find that the Commission did not act arbitrarily or capriciously in dismissing Florida Cellular's application for its failure to comply with the Commission's "hard look" cellular application rules concerning multiple ownership interests.

(App. 12a.)

The court acknowledged its prior holding that when the FCC intends to apply its rules rigidly, "'fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration.' *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985)." (App. 12a.) Nevertheless, the court found that the fact that the Florida had actual notice of the rule, taken in light of FCC rules and orders providing for "dismissal for failure to comply with the FCC rules and regulations," was sufficient:

> The Commission need not supply a separate "shopping list" specifying that each separate rule violation may lead to dismissal. It is enough that the FCC rules are clearly spelled out and applicants are on notice that their applications are subject to dismissal for failure to comply with these rules.

(App. 12a-13a.)

The court also agreed with the FCC that administrative efficiency concerns underlying the rule warranted denial of a waiver even though the rule was principally directed at knowing and intentional cross-ownership, not the unintentional and inadvertent cross-ownership at issue here. (App. 15a.)

The court disagreed with Florida's claim that holding it vicariously liable for a minor shareholder's conduct denied it due process

of law, noting that Florida was not "completely blameless for the violation." Citing the one letter to Yandell that had been returned to Florida as undeliverable, the court said "the company should have been aware that it had lost contact with Mr. Yandell." Moreover, the court noted that Florida eventually located him after the lottery. It concluded that "[i]n light of these facts, the Commission could conclude that the company's failure to exercise due diligence in keeping track of its shareholders was at least partly to blame for the rules violation that resulted in the dismissal of Florida Cellular's application." (App. 16a.) The court summed up its constitutional analysis as follows:

> We find that, for due process purposes, the Commission may also properly dismiss an application that does not comply with FCC rules when the applicant's lack of due diligence was at least partly to blame for the failure to comply.

(App. 17a.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT AND NOVEL QUESTIONS CONCERNING THE DUE PROCESS LIMITS ON A FEDERAL AGENCY'S IMPOSITION OF STRICT VICARIOUS LIABILITY ON THE CORPORATIONS IT REGULATES

This case presents the Court with the opportunity to address the constitutionality of federal agency action penalizing a corporation for conduct of a shareholder, unknown to and unpreventable by the corporation, which unintentionally violated an agency regulation. The agency in this case, the FCC, has held the corporation responsible for a violation of its rule prohibiting ownership of interests in competing cellular license applicants.

Holding corporations responsible for the acts of their shareholders, while foreign to traditional corporate law, is increasingly common, and the constitutional implications of such vicarious liability thus take on considerable importance. For example, the FCC has recently become heavily reliant on similar cross-ownership rules

in connection with new ubiquitous wireless services known as "personal communications services."

While this case involves an FCC regulation governing cross-ownership, the imposition of vicarious corporate liability is increasingly common in other contexts. In the past two decades, a number of cases have come to this Court raising questions concerning the extent to which rules assigning liability without fault could legitimately be employed to effectuate government policy.[4] These include cases involving (a) the criminal liability of corporations for the acts of their employees, *United States v. Park*, 421 U.S. 658 (1975); (b) the imposition of punitive damages on corporations under *respondeat superior* principles, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); and (c) the forfeiture of property used in criminal activity, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

Decided under the due process clause of the fifth or fourteenth amendments, these cases and their progeny embrace the principle that when a regulated party is innocent of wrongdoing and "powerless to prevent" a violation by others, no punishment or liability can constitutionally be imposed. *See United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964); *United States v. Park*, 421 U.S. at 658; *Pacific Mutual*, 494 U.S. at 1065; *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (finding that the imposition of punitive damages under 42 U.S.C. § 1983 on a municipality and thereby on its "blameless and unknowing taxpayers" satisfies neither reason nor justice"). To do so would essentially force the corporation to act as an insurer for a problem which it neither created nor can be reasonably expected to prevent.

This same rationale has been employed to invalidate land use regulations under the takings clause. *See Nollan v. California*

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[4] The rules in question in this case impose both strict and vicarious liability on petitioner. They impose strict liability because they penalize conduct without regard to the *de minimis* nature of the violation (0.85% shareholder's prohibited cross-holding of a 5% interest) and without regard to the unknowing, inadvertent, and unintentional nature of the violation. They further impose vicarious liability by attributing to the corporation the consequences of the shareholder's conduct without regard to the corporation's lack of knowledge concerning, or ability to prevent, the violative conduct or the capacity to control the shareholder's conduct.

Coastal Commission, 483 U.S. 825, 836 n.4 (1987) ("one of the principal purposes of the Takings Clause is to 'bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (*citing Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

It also reflects the analytical framework articulated in this Court's earlier decisions upholding a variety of state regulatory statutes extending responsibility for violations to non-culpable actors. *E.g.*, *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927) (upholding a wrongful death statute authorizing punitive damages although it was imposed "not only upon those at fault but upon those who, although not directly culpable, are able, nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented"); *P.F. Petersen Baking Co. v. Bryan*, 290 U.S. 570 (1934) (upholding regulation of the weight of bread loaves because compliance was possible); *cf. Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 515 (1924) (overturning similar regulation, in part, because losses in weight could not "be avoided or completely controlled"). As this Court stated in *Calero-Toledo*,

> it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in,and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

416 U.S. at 689-90.

The challenged regulation here sharply conflicts with these principles. That regulation, as interpreted by the FCC, prohibits a corporation from pursuing the opportunity to construct and operate a cellular system that would otherwise be available to it, if any of its shareholders, however passive or minor, had any interest, however small, in any competing applicant for the license at the time its application was filed. The corporation is simply and flatly held responsible for the prohibited conduct of all of its shareholders,

without regard to its relation to the shareholder, its knowledge or constructive knowledge of the violative conduct, or its ability to deter violations. Its application is rejected as "unacceptable for filing."

This rule does not assign *responsibility,* as the rule does not confer on the corporation any power to control its shareholders' investment decisions; it nevertheless makes the corporation the scapegoat when the shareholder's investments violated the rule. Given the lack of influence that a corporation has over a non-controlling shareholder, under long standing and well established principles of corporate law,[5] it would be hard to find a more novel application of vicarious liability principles. A corporation which could not enforce disclosure of the shareholder's other investments, much less prevent them, is nevertheless made responsible if the investor independently makes an unlawful investment.

Here, this departure from traditional notions of corporate responsibility means that the innocent shareholders lost not only their investment, but also a license worth scores of millions of dollars, because of the unwittingly violative conduct of a shareholder holding 0.85% of the company's stock. For thousands of other investors in corporations regulated by the FCC, this rule interpretation raises the prospect that their investments, too, are at risk due to the actions of other shareholders that may violate FCC ownership rules. The assignment of national radio spectrum resources and the development of the "information highway" are thus governed by rules of highly questionable constitutional validity.

II. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE PERMISSIBILITY OF IMPOSING VICARIOUS LIABILITY UNDER THE COMMUNICATIONS ACT AND THE NOTICE REQUIRED WHEN SUCH LIABILITY RULES ARE ESTABLISHED

The constitutional problems created by the FCC's rule are compounded by two important unresolved statutory issues: whether the Communications Act authorizes the imposition of vicarious liability; and what notice must be given when the FCC establishes

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[5] *See generally* Fletcher, Cyclopedia of Corporations §§ 2098, 5730 (Perm. Ed.).

such liability rules. Significant issues concerning a statute of broad applicability warrant review. *See, e.g., Andrus v. Utah,* 446 U.S. 500, 506 (1980) (granting certiorari to resolve "a significant issue regarding the disposition of vast amounts of public lands"); *United States v. Donovan,* 429 U.S. 413, 422 (1977) (granting certiorari to determine the proper "construction of a major federal statute").

First, it is unclear whether the Communications Act authorizes the FCC to impose a vicarious liability requirement on cellular license applicants. Prior to this case, there had been no reported case of an application being dismissed, or an applicant being deemed unqualified, due to the conduct of a very minor shareholder with no attributes of control. Even after the promulgation of the rule in question in this case, its actual application has elsewhere been limited to general partners, managers, and controlling shareholders. No congressional enactment provoked the FCC's interpretation of the rule that mandated Florida's dismissal after winning the licensee selection lottery because of cross-ownership by a minor passive shareholder. Given the serious constitutional problems this interpretation evokes (*see* Sections I, *supra,* and III, *infra*), it cannot be assumed that Congress ever intended such a result.

Indeed, it is a canon of statutory construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council,* 485 U.S. 568, 575 (1988); *United States v. Jin Fuey Moy,* 241 U.S. 394, 401 (1916); *see also City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981) (interpreting Section 1983 to prohibit the extension of vicarious liabilities to a municipality in the absence of explicit Congressional authorization); *United States v. Hill,* 676 F. Supp. 1158 (N.D. Fla. 1987) (limiting vicarious responsibility in interpreting the Federal False Claims Act). An agency's interpretation of a statute should be invalidated if it raises "grave and doubtful constitutional questions." *United States v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909). This is patently the case here.

If the Court finds that the FCC had no statutory authority to impose vicarious liability under the public interest standard of the

Communications Act or other provisions of that Act, Congress would then be in a position to decide whether to grant the FCC such authority for the future. This would avoid any need to reach the constitutional issues posed by such regulations unless and until Congress changes the law. *See FTC v. American Tobacco Co.*, 264 U.S. 298, 305-07 (1924); *cf. Rust v. Sullivan*, 500 U.S. 173 (1991); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

Second, it is well settled under the Communications Act that when the FCC chooses to make violation of one of its rules grounds for imposing a sanction as drastic as dismissal without further consideration of fault or interest, it must give clear and unambiguous notice of the requirements that must be met to comply. *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968); *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987). This has meant that the FCC must articulate what it requires with sufficient clarity "that, based on a 'fair reading' of its order, the petitioners know or should have known what the Commission expected of them." *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993).

No such notification, as envisioned by these authorities, was ever given by the FCC to Florida. Rather, the court of appeals relied on the promulgation of the rule itself as sufficient notice, treating the rules defining the violation and its consequences as "clearly spelled out." (App. 13a.) The problem with this statement, as elaborated more fully in Section III.B, *infra*, is that by no "fair reading" of the rules cited by the court could Florida have anticipated the FCC's subsequent interpretation. It is unclear whether the rule "defining" a violation applies to passive, non-controlling shareholders. Even if it does, there was no reference in it, or in any pronouncement by the FCC relating to it, indicating that a violation by such a shareholder would disqualify the corporation.

The rule authorizing dismissal of applications deemed unacceptable for filing is similarly ambiguous. It simply states that violations of FCC rules can result in dismissals of applications. In fact, some violations of some rules result in dismissal and some do not. The rationale of the cases laying down special notification requirements imposing strict liability for inadvertent violations is that the applicant

needs some warning and the opportunity to take additional precautions to comply with a "strict enforcement" regulatory regime.

The court of appeals failed to address these issues and in fact recharacterized the precedent to permit the agency virtually unlimited discretion as to when, and in what ways, it would impose strict, and in this case, vicarious liability, thereby radically altering the due process protections afforded to applicants. Since such applicants can only seek review of the FCC's actions in the D.C. Circuit, that court functions, in the absence of Supreme Court review, as a court of last resort. Given the number of applicants and licenses faced with "strict enforcement" of FCC rules, the issue is sufficiently important to warrant review by this Court. *United States v. Donovan*, 429 U.S. 413 (1977).

III. THE APPLICATION OF VICARIOUS STRICT LIABILITY HERE INFRINGED THE CORPORATION'S RIGHT TO DUE PROCESS OF LAW

The dismissal of Florida's application, after being tentatively designated the licensee for the Maryland-2 market, deprived it and its innocent shareholders of a substantial property interest entitled to constitutional protection. *See Regents v. Roth*, 408 U.S. 564 (1972); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926); *Buchanan v. Warley*, 245 U.S. 60 (1917).

The deprivation of that interest by the FCC as a consequence of an 0.85% shareholder's inadvertent purchase of an interest in a competing company bears no rational relationship to the FCC's interests or objectives. Imposing this liability without fair notice to the corporation of the scope, requirements, and consequences of the FCC's rule on this subject, and with no opportunity to eliminate violative conduct once discovered, compounds the arbitrariness of the FCC's actions and constitutes an independent due process violation.

A. The Constitutionality of the FCC's Imposition of Vicarious Strict Liability on Florida

Whether the FCC's rule, as interpreted in this case, passes constitutional muster turns on an inquiry into the degree to which the means chosen by the FCC bears a real and substantial relation to the object sought to be attained. *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). Although the degree of scrutiny of the fit between means and ends has fluctuated in different periods in the Court's history, the need for such a "rational relationship" between the two, in both equal protection and due process cases involving economic interests, has remained the talisman for determining whether a sufficient nexus exists to sustain a challenged regulation. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Williams v. Vermont*, 472 U.S. 14 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *but see Williamson v. Lee Optical*, 348 U.S. 483 (1955).[6]

In the instant case, this mandate requires an examination of (a) the FCC's stated purpose for the rule—discouraging speculation in licenses—and (b) the means employed to achieve these purposes in this case—disqualification of a corporation because of Yandell's unwitting investment in two applicants.

Even under the most minimal scrutiny of the nexus between ends and means evoked here, there is no relationship. If the goal the FCC sought to accomplish is to check speculation, that goal is not served by flatly and absolutely disqualifying an applicant when there is no speculative activity involved—when the cross-ownership that occurs is unintended, the corporation and offending stockholder disclose the existence of the cross-ownership once it is discovered, and they agree to end the cross-ownership by having the stockholder divest without any gain. Where the evidence shows a lack of speculative intent and an absence of any prospect of speculative gain, there is simply no

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[6] Although the more recent cases cited above involved equal protection challenges, essentially the same rational relationship analysis followed in due process and equal protection cases involving economic interests. *See Richardson v. Belcher*, 404 U.S. 78 (1971).

basis for the dismissal of the application. Yandell here had nothing to gain or lose from a grant or dismissal of the application; the only ones penalized are the innocent shareholders.

The rule at issue did not specifically require disqualification of Florida; it merely prohibited cross-ownership. The FCC could have avoided any constitutional infirmity by interpreting its regulation more rationally, in light of its anti-speculation purpose. For example, it could have read the rule to require disqualification of the corporation's application only in the case of cross-ownership by the corporation itself or its controlling shareholders. This would not have required a particular percentage of ownership to be specified, as long as the agency is willing to engage in a case-by-case analysis and provide a rational basis for any determination that control exists. *See, e.g., Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 2319-20 (1994) ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and in extent to the impact of the proposed development"). Or, it could direct its enforcement efforts against the party with the power to control a shareholder's investments—the shareholder himself. In fact, this has long been the FCC's mode of proceeding against prohibited cross-ownership, as Florida showed in its petition for rehearing below:

> While the FCC has reserved the right to take action against corporate applicants and licensees, it has generally proceeded by "order[ing] individual stockholders to divest themselves of violative holdings." *Attribution of Ownership Interests*, 97 F.C.C. 2d 997, 1033 (1984) (citing cases). Thus, when a broadcaster who exceeds the cross-ownership or multiple ownership limits due to non-controlling shareholders' other investments seeks to acquire an additional station, the FCC does not disqualify the corporation and dismiss the application; instead, it typically grants temporary waivers of those rules, grants the license application, and pursues a separate proceeding against the violative shareholder. *See, e.g., Pinelands, Inc.*, 7 FCC Rcd. 6058 (1992), *appeal dismissed sub nom. Garden State Broadcasting Limited Partnership v. FCC*, No. 91-1043 (D.C. Cir. June 29, 1993).

(App. 41a.)

Simply put, to make the inadvertent cross-ownership by a non-controlling shareholder, which was unknown to and unpreventable by the corporation, the basis for dismissing the corporation's application bears no rational relationship to the FCC's anti-speculation goal and is neither rational decisionmaking, *see Burlington Truck Lines v. United States*, 371 U.S. 156 (1962) (requiring a rational connection between the facts found and the choice made), nor constitutionally supportable, *see United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964) and cases cited in Section I, *supra*.

The court of appeals and the FCC effectively acknowledged that the goal of discouraging speculation provides no support for interpreting the rule as an absolute prohibition, given the facts here. Instead, they held that one purpose of the rule is to eliminate delay and thereby increase administrative efficiency. Given that purpose, they held, applying the rule as a flat prohibition resulting in dismissal serves the objective of the rule by eliminating any need for individualized "fact-specific analysis of intent" and allowing efficient processing. (App. 14a-15a, 22a, 26a.) What the court and the FCC failed to address, however, is that the flat prohibition/dismissal approach has failed in this case to speed application processing and is unlikely to speed processing appreciably in general. (App. 49a n.14.)

Moreover, even if administrative efficiency *were* served by this approach, the FCC cannot base a draconian penalty merely on administrative efficiency and convenience without raising substantial due process issues. *See Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). To hold that administrative efficiency and convenience are a sufficient basis for imposing significant substantive burdens on regulatees would give the FCC *carte blanche* to take any action it pleases, without regard to the statutory touchstone of "public interest, convenience, and necessity" that is supposed to govern its licensing decisions. 47 U.S.C. §§ 307(a), 309(a); *see NBC v. United States*, 319 U.S. 190, 215 (1943); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

The only conceivable purpose for imposing strict vicarious liability for shareholders' cross-ownership would be to encourage corporate efforts to prevent their shareholders from engaging in cross-

ownership. There is, however, no such requirement in the FCC's rule or in the decision adopting the rule. Moreover, a corporation could not be expected, under traditional corporate law, to take steps beyond those taken by Florida, namely, send notices to shareholders concerning the cross-ownership ban. A corporation does not have authority to require or enforce disclosure of, or set limits on, the investments of every person who owns its stock. A corporation does not have the power to track its shareholders' investments in order to avoid having cross-ownership attributed to it, yet the FCC claimed that applicant corporations are under some duty to do so.[7] The FCC here, with the court's endorsement, imposed the risk and costs of deterring cross-ownership entirely on an entity unable to take effective action. Holding the corporation responsible for its noncontrolling shareholders' cross-ownership violations bears no rational connection to *any* goal.

This conclusion is in no way altered by the FCC's suggestion that Florida could have avoided the violation by greater diligence (App. 22a, 23a n.6), or the court's statement that Florida was "at least partly to blame" for the violation (App. 16a). The FCC and the court base these conclusions on the basis that (1) Florida knew before the Maryland-2 application filing that Yandell had moved when a letter addressed to him was returned by the post office as undeliverable and (2) Florida located Yandell after it won the lottery. Accordingly, they reason, Florida could have exercised greater diligence before the Maryland-2 application was filed, located him, and taken steps to eliminate any cross-ownership.

This is pure speculation, not based on the record and is highly questionable for several reasons. First, Florida had no reason to believe that Yandell had not received the earlier mailing advising all shareholders that the cross-ownership rule was adopted; that letter was not returned. Thus, the company had no reason to believe there was a cross-ownership problem to eliminate. It is unclear what "diligence" the FCC expected the company to exercise if it had tracked him down immediately. Second, there was no rule or

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[7] The FCC claimed that § 22.921(b)(1) (1988) "requires applicants to avoid cross-ownership interests; it does not exempt those who file multiple applications and fatally err by not diligently tracking their assorted potential cross-interests." (App. 22a.) This requirement appears nowhere in the text of the rule, however.

announced policy requiring applicants to track down their minor shareholders diligently. Third, the record does not reflect how Florida came to discover Yandell after the lottery—whether this was due to Florida's diligence at that point or, more plausibly, the result of Yandell contacting Florida after hearing the lottery results and discovering that the company he thought was defunct had won a lottery. Fourth, the letter that was returned came back in August 1988, after the application filing process was well underway. It is unlikely that the company could, even with extraordinary diligence, have located Yandell, discovered the cross-ownership, and obtained a waiver of 47 C.F.R. § 22.922(a) to remove Yandell as a shareholder,[8] in the short time before the Maryland-2 application was due to be filed in December.

There is, accordingly, no record basis for assigning any blame or lack of diligence to Florida, either as the basis for denying the waiver or as the basis for holding that Florida got all the process it was due.

B. Failure to Afford Florida Adequate Notice of the Requirements It Had to Meet to Avoid Dismissal

The court of appeals gave short shrift to Florida's claim that the Commission never gave adequate notice that a minor, passive shareholder's cross-interest would render its application unacceptable for filing. The court held that Florida had adequate notice based on the existence of the rule, of which Florida had actual notice, and the FCC's general rule that applications would be subject to dismissal for failing to comply with all rules. (App. 12a-13a.)

Neither the scope of the FCC's cross-ownership rule, the fact that the FCC would interpret the rule as attribution of shareholder cross-holdings to corporate applicants, nor the potential consequences of a violation were ever "clearly spelled out" (App. 13a) as the court believed. The rule itself was ambiguous:

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[8] This rule prohibits all changes in ownership of pending cellular applications. Since the application filing process ran from July 1988 through January 1989, any changes in Florida's ownership without obtaining a waiver would have violated this rule, putting many applications at risk of dismissal.

> For rural service areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same rural service area, including an interest of less than one percent.

47 C.F.R. § 22.921(b)(1) (1988) (App. 53a). The rule did not explicitly address application content or acceptability; it was a directive to all "parties to applications" not to hold interests in multiple applications. The term "party to a non-wireline application" was undefined. The consequences of a violation of this directive by such a party are not spelled out; it does not specify that violations will result in the application being deemed defective. There is no mention of attribution of violations to the applicant itself, no mention of vicarious liability.

The FCC decision adopting the rule gave no more guidance than the rule itself. The FCC adopted the rule in response to applicants' practice under the predecessor rule of forming "alliances" by which they obtained small interests in each others' applications. The FCC viewed this as speculation and was concerned because the amendments and other paperwork resulting from these alliances were impacting its application processing. It adopted the rule at issue in connection with eliminating such alliances. *Rural Cellular Service*, CC Docket 85-388, *Third Report and Order*, 4 F.C.C.R. 2440, 2443 & n.18 (1988). There was no mention in this decision, the news release concerning it, or the summary published in the Federal Register that the rule would be enforced strictly through dismissal of violators' applications, or that corporate applicants would be held responsible for their shareholders' offending investments.

Nor does 47 C.F.R. § 22.923(b)(1), relied upon by the court below (App. 10a), give the required notice. This rule simply requires applicants to acknowledge that the FCC may impose dismissal as a sanction for rule violations. It has never been viewed by the FCC as mandating dismissal for any and all rule violations, and it has never (before the instant case) been used as the basis for dismissing a corporation's application due to rule violations by a minor, non-controlling shareholder that occurred without the corporation's actual or constructive knowledge. In fact, all of the other cellular cases in which an application is dismissed because of an owner's rule violation involved owners with attributes of control—they were

general partners, held management positions, or possessed substantial ownership interests.[9]

The court claimed that the FCC need not supply a "shopping list" indicating which rule violations will lead to dismissal. (App. 13a.) However, the very cases the court cites in reaching this conclusion were premised on the FCC's issuance of a detailed list of the specific application content deficiencies that would result in dismissal.[10] Moreover, *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985) disposes of the court's assertion that the FCC need not specify which requirements are subject to a "hard look" policy and may simply dismiss applications for any and all rule violations. In that case, the court sustained the dismissal of one application, which failed to contain information on the FCC's list of essential prerequisites, but it also vacated the dismissal of another application for a deficiency regarding an item not listed as being subject to the "hard look" dismissal policy. 778 F.2d at 875. The court held, "the *quid pro quo* for stringent acceptability criteria is explicit notice of all acceptability requirements . . . . The less forgiving the FCC's acceptability standard, the more precise its requirements must be." *Id.*

The FCC's announcement for the first time in Florida's case that the rule is an "absolute prohibition" requiring strict compliance by all shareholders and imposes vicarious liability on corporate applicants for all violations by all shareholders, comes too late to comport with the notice requirement set forth in these cases.

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[9] *E.g., Progressive Cellular III B-3*, 6 F.C.C.R. 7178 (1991), *aff'd mem. sub nom. Progressive Cellular III B-3 v. FCC*, 986 F.2d 546 (D.C. Cir.), *cert. denied*, 114 S.Ct. 174 (1993); *Moving Phones Partnership L.P. v. FCC*, 998 F.2d 1051, 1057 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 1369 (1994); *MV Cellular, Inc.*, 103 F.C.C.2d 414, 420 (1986).

[10] *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 322-23 (D.C. Cir. 1994) (involving an applicant who failed to include information on the list of "indispensable components of a 'substantially complete' license application"); *Glaser v. FCC*, 20 F.3d 1184, 1186 (D.C. Cir. 1994); *Russian River Vintage Broadcasting v. FCC*, 5 F.3d 1518, 1520 (D.C. Cir. 1993); *see also Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 27, 1994.

APPENDIX

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[28 F.3d 191]

United States Court of Appeals
DISTRICT OF COLUMBIA CIRCUIT.

Argued May 10, 1994. Decided July 15, 1994.

No. 92-1664

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

WENDY C. COLEMAN, DOING BUSINESS AS WCC CELLULAR;
JAJ CELLULAR,
INTERVENORS

Rehearing and Suggestion for Rehearing
In Banc Denied Sept. 28, 1994.

Appeal of an Order of the
Federal Communications Commission

Michael D. Sullivan, argued the cause for appellant. With him on the briefs was *Gary Bellow.*

Daniel M. Armstrong, Associate Gen. Counsel, Federal Communications Commission, argued the cause for appellee. With him on the brief were *William E. Kennard,* Gen. Counsel, *Jane E. Mago,* Asst. Gen. Counsel, and *John P. Greenspan,* Counsel, FCC. *John E. Ingle,* Deputy Associate Gen. Counsel, and *Roberta L. Cook,* Counsel, FCC, entered an appearance.

John D. Seiver, argued the cause for intervenor Wendy C. Coleman. With him on the brief was *James F. Ireland, III.*

Harry F. Cole entered an appearance for intervenor JAJ Cellular.

Before: MIKVA, *Chief Judge,* SENTELLE, *Circuit Judge,* and MACKINNON, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge:* Florida Cellular Mobil Communications Corporation ("Florida Cellular") appeals from decisions of the Federal Communications Commission ("Commission" or "FCC") that dismissed the company's application for a license to construct and operate a cellular communications system in southern Maryland and along Maryland's Eastern Shore. The Commission dismissed the application as "unacceptable for filing" because one of Florida Cellular's shareholders held an interest in a competing applicant in violation of the FCC's multiple ownership regulations. Because the regulations clearly provided that multiple ownership interests in competing applicants were prohibited, and Florida Cellular was on notice that its application was subject to dismissal for non-compliance with FCC regulations, we affirm the Commission's decisions.

I. BACKGROUND

In the early 1980's the Commission established procedures to determine which applicants would be issued licenses to construct and operate cellular communications systems in the larger metropolitan areas within the United States. The Commission refers to these areas as Metropolitan Service Areas. The Commission permitted parties to these applications to have multiple ownership interests of less than 1% in competing applicants in order to provide some latitude for the parties to form business relationships. *Cellular Lottery Order,* 98 F.C.C.2d 175, 217-18 (1984), *recon.,* 101 F.C.C.2d 577 (1985), *further recon.,* 59 Rad.Reg.2d (P & F) 407 (1985). The procedures adopted by the Commission allow for licenses to be issued to two carriers within each of the Service Areas, with one license reserved for "wireline" carriers (telephone companies) and the other reserved

for "nonwireline" carriers (applicants other than telephone companies).

In order to streamline the licensing process and to provide cellular service to the public in a more timely manner, the Commission has since 1984 selected the tentative licensee from among competing applicants through a lottery, as authorized by section 309(i) of the Communications Act, 47 U.S.C. § 309(i) (1988), rather than through competitive hearings. Each facially complete application is qualified to be included in a lottery for a particular Service Area license upon the applicant's certification that the application is complete and contains all the information required by the application form and the FCC regulations. *Cellular Lotteries Further Reconsideration Order,* 59 Rad.Reg.2d (P & F) 407, 410 & n.16 (1985). To speed the selection process, however, once the application is filed, the FCC rules prohibit applicants from filing amendments to their applications until the lottery produces the tentative selectee for the relevant market.[1] *Cellular Lottery Order,* 98 F.C.C.2d 175, 220 (1984); 47 C.F.R. § 22.918(b) (1993). Once filed, the Commission does not review the applications further until the lottery is completed.

When the lottery produces a tentative selectee, the Commission reviews only the selected application to determine whether it is "acceptable for filing," *i.e.,* whether it complies with the FCC procedural and substantive rules and regulations. 47 C.F.R. § 22.20(a)(2) (1993). One of the Commission's principal cellular rulemaking orders states that "the tentative selectee's application will be carefully reviewed to ensure its compliance with the cellular application standards and will be dismissed for failure to do so." *Cellular Lotteries Further Reconsideration Order,* 59 Rad.Reg.2d (P & F) 407, 410 (1985). The FCC rules also provide:

> (a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant ... if:
>
> (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

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[1] Once the lottery is complete, the tentative selectee is permitted to file certain minor amendments. 47 C.F.R. § 22.918(b) (1993).

47 C.F.R. § 22.20(a)(2) (1993). If it determines that the application is acceptable, the Commission provides public notice as to the identity of the tentative licensee. Competing applicants are then entitled to challenge the application of the tentative licensee by filing petitions to deny the application.

In 1985, the Commission established procedures for processing applications for cellular licenses in the remaining areas of the country, the so-called Rural Service Areas. Although most of the procedures established for the Metropolitan Service Area application process applied, the Commission's experience in processing the applications for the Metropolitan Service Areas convinced the Commission to change some of the regulations for the processing of the applications for the Rural Service Areas. The Commission amended its regulations concerning partial settlements, multiple ownership interests in more than one applicant for the same Rural Service Area license, and transfers of interests in Rural Service Area applications. *See Amendment of the Commission's Rules for Rural Cellular Service,* 64 Rad.Reg.2d (P & F) 1382, 1383 (1988) [hereinafter "*Cellular Amendment*"]. The Commission found that allowing multiple ownership interests of less than 1% in competing cellular applications encouraged applicants to enter into partial settlements[2] whereby the applicants made mutual promises to convey a portion of their interests to other members of the settlement group upon being selected as the tentative selectee. In turn these partial settlements delayed the inauguration of service to the public because they encouraged losing applicants to file petitions to deny the winning applications alleging that the tentative selectees were not the real parties in interest. To prevent this delay in inaugurating cellular

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[2] The Commission described a "partial settlement" as:

> any arrangement among fewer than all of the applicants in a market that provides any reciprocal interests in the applications of the parties to the arrangement. The term includes the so-called "alliance agreements" whereby each participant in the alliance agrees that if it wins a particular market it will retain at least 50.1% of the application and that the other members of the alliance will each obtain a maximum interest of 0.99% in the winning application.

Cellular Amendment, 64 Rad.Reg.2d at 1383 n. 3.

service in the Rural Service Areas, the Commission adopted 47 C.F.R. § 22.921 which in relevant part provides:

> For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent.

47 C.F.R. § 22.921(b) (1993). The Commission also acted to prevent the delay associated with the pre-licensing transfer or assignment of cellular applications. Noting that such transfers required the Commission to restart the application processing cycle and to issue a new public notice which "results in the disruption of orderly processing, slows the initiation of service to the public, and is not in the public interest," *Cellular Amendment,* 64 Rad.Reg.2d at 1387, the Commission also adopted 47 C.F.R. § 22.922 which at the relevant time provided:

> Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

47 C.F.R. § 22.922(a) (1988).

II. FACTS

Florida Cellular was organized in 1983 for the purpose of filing applications to provide cellular service in seven of the Metropolitan Service Areas. Yerger Yandell was one of the company's original shareholders, having paid $10,000 for an 0.85% interest in Florida Cellular. Although the company had hired counsel to prepare and file the applications, no applications were ever filed on Florida Cellular's behalf for these areas. In 1984, Mr. Yandell moved to a new residence without notifying the company of his new address, apparently believing that the company was defunct.

Although Florida Cellular began mailing periodic notices to its shareholders in 1984, Mr. Yandell did not receive any of these notices, and at least one was returned to the company marked "Unable to deliver—no forwarding address." In 1987, Florida Cellular reached a settlement with the attorney it had hired to prepare and file its Metropolitan Service Area applications whereby the attorney agreed to prepare and file 125 applications for the Rural Service Areas on behalf of the company.

Many of the notices that Florida Cellular sent to its shareholders in 1988 involved the company's intent to file applications for the Rural Service Areas. These notices also apprised the shareholders of the Commission's new rules for the filing of these applications, including the rule prohibiting the ownership of interests in competing applicants.

The Maryland 2 market, comprised of much of southern Maryland and the Eastern Shore, was among the Rural Service Areas for which Florida Cellular filed an application. Kudzu Cellular Partnership ("Kudzu"), a company in which Mr. Yandell owned a 5% interest, also filed an application for this area. When the lottery was conducted on November 22, 1989, Florida Cellular was selected as the tentative selectee. Following its selection, Florida Cellular updated its shareholder mailing list and obtained Mr. Yandell's new address. In a letter dated December 21, 1989, the company notified its shareholders, including Mr. Yandell, that it had been selected in the lottery for the Maryland 2 market. Mr. Yandell thereafter notified the company of his interest in Kudzu.

Before the Commission issued its public notice designating Florida Cellular as the tentative selectee for the Maryland 2 market, counsel for Mr. Yandell and Florida Cellular informally disclosed Mr. Yandell's dual interests to the Commission. On March 26, 1990, the Commission issued the public notice naming Florida Cellular as the tentative selectee for the Maryland 2 market, and, on that same date, a Commission staff member apparently notified the company that, in the absence of a petition to deny Florida Cellular's application, Mr. Yandell's dual interest would likely not be disqualifying provided that he was removed from one of the applications.

Florida Cellular, claiming that the multiple ownership violation was inadvertent and minor, subsequently petitioned the Commission for a waiver of 47 C.F.R. § 22.922, which would permit the company to repurchase Mr. Yandell's stock and bring its application into compliance with 47 C.F.R. § 22.921. Before the Commission acted on this petition, a losing applicant, JAJ Cellular Partnership ("JAJ"), filed a petition to deny the application, claiming that the proposal to repurchase the stock might allow Mr. Yandell to realize a substantial profit. In response to JAJ's petition, Florida Cellular submitted an executed agreement that allowed the company to repurchase Mr. Yandell's stock at his original purchase price.

The Mobile Services Division of the Commission's Common Carrier Bureau dismissed the applications of both Florida Cellular and Kudzu on January 18, 1991. The decision stated that Florida Cellular's application was defective at the time it was filed and noted that such a defective application could not be amended to bring it into compliance with Commission rules. *Florida Cellular Mobile Communication Corp.*, 6 F.C.C.R. 354, 355 (Mob.Serv.Div. 1991). Florida Cellular filed a petition for reconsideration claiming that "a policy decision . . . to reject all non-wireline [Rural Service Area] applications that violate any rule, without independently considering the facts of each case[, a]lthough administratively convenient, . . . would be wholly arbitrary and contrary to the public interest." App. at 130. The Commission, noting that "[a] rule such as Section 22.921 could not be efficiently applied if a fact-specific analysis of intent were required in particular cases," *Florida Cellular Mobil Communications Corp.*, 6 F.C.C.R. 6910, 6910 (1991), denied the company's petition for reconsideration. On December 1, 1992 the Commission denied the company's second petition for reconsideration, stating that "[Florida Cellular's] responsibility to keep its stockholders advised of matters that could lead to violation of Section 22.921, and Yandell's responsibility to comply with Section 22.921 each establish a duty which, with reasonable exercise of diligence, could have avoided violation of Section 22.921 and application dismissal." *Florida Cellular Mobile Communications Corp.*, 7 F.C.C.R. 7856, 7857 n. 6 (1992). Following the Commission's denial of its second petition for reconsideration, Florida Cellular filed this appeal.

III. Discussion

Florida Cellular advances three arguments to support its contention that the Commission improperly dismissed its application. First, Florida Cellular asserts that the Commission's application of its multiple ownership rules was arbitrary and capricious. Second, the company contends that the Commission's refusal to grant a waiver to Florida Cellular constituted an abuse of discretion. And finally, the company contends that the Commission denied it due process of law. We will first discuss the appropriate standard of review to be applied, and then we will address each of these arguments in turn.

A. The Standard of Review

Typically, we approach decisions based on an agency's interpretation of its governing statute and its regulations with all due deference. *See Udall v. Tallman,* 380 U.S. 1, 16-17, 85 S.Ct. 792, 801-01, 13 L.Ed.2d 616 (1985). Florida Cellular suggests that the court should apply heightened scrutiny to the Commission's actions under review in this case because the Commission has changed its rules and policies regarding multiple ownership interests in competing cellular applicants. The company implies that these changes indicate "that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 851 (D.C.Cir. 1970), *cert. denied,* 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971) (footnote omitted).

If an agency is to function effectively, however, it must have some opportunity to amend its rules and regulations in light of its experience. As this court has recently stated, "the fact that an agency rule represents a change in course simply requires courts to make sure that prior policies are being deliberately changed, not casually ignored, and that the agency has articulated permissible reasons for that change." *Clinton Memorial Hosp. v. Shalala,* 10 F.3d 854, 859 (D.C.Cir. 1993) (citations and internal quotation marks omitted).

When the Commission adopted the new rules that were to govern the licensing process for the Rural Services Areas, it issued a report explaining the reasons behind these changes. According to the report, the Commission "concluded, after carefully reviewing all comments

filed in this proceeding and our experiences in processing the approximately 100,000 [Metropolitan Service Area] applications, that prohibiting non-wireline partial settlements would be in the public interest." *Cellular Amendment,* 64 Rad.Reg.2d at 1385. This report describes a number of problems in the processing of the Metropolitan Service Area applications that could be traced to the partial settlements. These problems included increased litigation and subsequent delay of construction authorizations, the filing of applications by non-*bona fide* applicants, and the filing of petitions to deny the winning application, questioning whether a winning applicant was the real party in interest. *Id.*

As far as the multiple ownership rules were concerned, the report states:

> The 1% exception provided a basis in many markets for hundreds of applicants to enter partial settlements or alliances and then, if they became tentative selectee, to dilute their interests pursuant to the agreements that they signed with marketeers of applications. Parties filed petitions to deny alleging that such tentative selectees were not the real party in interest in their applications. Those petitions delayed the authorizations. Therefore, consistent with our ban on non-wireline partial settlements, we find no justification for retention of the multiple ownership exception for the non-wireline applicants.

Id. at 1387 (footnotes omitted). This analysis demonstrates that the Commission did not "casually ignore" its prior policy concerning partial settlements, multiple ownership interests, and pre-authorization transfers of interests in cellular applications, but instead, deliberately changed it. Furthermore, the avoidance of the processing problems and service delays caused by these factors is certainly a permissible reason for the change, especially given this Court's prior admonition "that it is high time to move cellular telephone services from the FCC's regulatory process to the marketplace. To ignore this point would be to ignore Congress' fundamental mandate to the FCC to make communications systems available to the public." *MCI Cellular Tel. Co. v. FCC,* 738 F.2d 1322, 1328-29 (D.C.Cir. 1984) (citing 47 U.S.C. § 151 *et seq.* (1988)).

The rule changes that the Commission made in this case were a reasonable response to the problems that the Commission experienced in processing applications and granting licenses for the Metropolitan Service Areas. Such changes do not indicate that the Commission acted with the kind of "mindless inconsistency and equivocation that signals arbitrariness." *Telocator Network of Am. v. FCC*, 691 F.2d 525, 540 (D.C. Cir. 1982). Therefore, we reject Florida Cellular's suggestion that the rule changes make it appropriate to apply "heightened scrutiny" to the Commission actions that the company is challenging on this appeal.

B. The Commission's Dismissal of Florida Cellular's Application

Florida Cellular raises a number of points in arguing that the Commission's dismissal of its application was arbitrary and capricious. Florida Cellular contends that the Commission cannot reasonably read its rules in such a way that the Commission can hold the company responsible for Mr. Yandell's actions. This argument simply misconstrues the motive behind the Commission's actions in this case. The Mobile Services Division dismissed Florida Cellular's application after finding that the company had filed a defective application. *See Florida Cellular Mobile Communication Corp.*, 6 F.C.C.R. at 355. It was the applicant's responsibility to ensure that the application it submitted was complete and complied with the FCC substantive and procedural rules. When the application was submitted, an authorized representative of Florida Cellular was required to certify to the following:

> I hereby certify, under penalties of perjury, this application for an initial cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that if, upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration.

47 C.F.R. § 22.923(b)(7) (1993). The Commission also stated that Florida Cellular could have avoided a violation of § 22.921 and application dismissal if it had exercised reasonable diligence in performing its responsibility to keep its stockholders advised of matters that could lead to violations. *See Florida Cellular Mobile*

Communications Corp., 7 F.C.C.R. at 7857 n. 6. Although Mr. Yandell's dual interests caused the violation, the Commission could properly dismiss the application for Florida Cellular's failure to file an application that complied with the FCC rules, an act that was the company's responsibility to perform.

Florida Cellular also alleges that the Commission acted arbitrarily and capriciously because the Commission dismissed the company's application without considering "what sanction is most appropriate, given the facts of the case and the purpose that the rule is intended to serve." Appellant's Br. at 32. We must reject this argument. When reviewing agency decisions, this court does not require agencies to justify their actions as the "most appropriate" under the circumstances. Under the Administrative Procedure Act, we must affirm an agency's orders unless they are arbitrary, capricious, an abuse of discretion, or not in accordance with the law. 5 U.S.C. § 706(2)(A) (1988). The scope of review under this standard is "narrow," and a reviewing court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983). The court's duty is to ensure that the Commission has "examined the relevant data and articulated a satisfactory explanation for its action," *id.* at 43, 103 S.Ct. at 2866, based on the materials that were before the Commission at the time its decision was made.

In this case the Commission decided to dismiss an application that it found to be "unacceptable for filing" because a shareholder's dual ownership interests in competing applicants violated the FCC rules. On a number of prior occasions when the Commission has promulgated "hard look" rules for the purposes of expediting the processing of applications and of providing a quick, simple method of selecting a prospective licensee, we have upheld the Commission's dismissal of an application that violated one of the FCC's technical rules as a proper exercise of the Commission's discretion. *See Moving Phones Partnership L.P. v. FCC*, 998 F.2d 1051, 1057 (D.C. Cir. 1993) (upholding the FCC's dismissal of applications for cellular licenses because applying partnerships included aliens among their general partners in violation of the Communications Act), *cert. denied*, __ U.S. __, 114 S.Ct. 1369, 128 L.Ed.2d 46 (1994); *Russian River Vintage Broadcasting v. FCC*, 5 F.3d 1518, 1521 (D.C.Cir. 1993) (upholding FCC's dismissal of application for FM radio station

license for failure to provide verifiable transmitter site information); *Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1320 (D.C.Cir. 1991) (upholding FCC's dismissal of an application for FM radio station license for failure to comply with antenna height limits). The Commission's rules and orders put the applicants on notice that their applications would be subject to dismissal for failure to comply with the FCC procedural and substantive rules. *See supra* at 193 [3a-4a]. Therefore, we find that the Commission did not act arbitrarily or capriciously in dismissing Florida Cellular's application for its failure to comply with the Commission's "hard look" cellular application rules concerning multiple ownership interests. Because the dismissal was neither arbitrary nor capricious, the decision to dismiss was one properly within the Commission's discretion, and we will not substitute our judgment to determine whether this sanction was the "most appropriate."

Florida Cellular also argues that its application should be reinstated because the Commission "gave no notice that applications would be subject to dismissal as unacceptable for filing for minor passive shareholders' unintentional multiple application interests." Appellant's Br. at 34. What this court has stated in addressing similar arguments in the context of applications for licenses to build and operate FM radio stations applies here with equal force. In *Glaser v. FCC*, 20 F.3d 1184, 1186 (D.C.Cir. 1994), the court stated that "[t]here can be no doubt of the FCC's authority to impose strict procedural rules in order to cope with the flood of applications it receives or expects to receive." *See also JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 329 (D.C.Cir. 1994). However, when the Commission does impose such strict procedural rules, "fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration." *Salzer v. FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985). As far as the cellular applications are concerned, the Commission promulgated a rule prohibiting multiple ownership interests in competing applicants, including ownership interests of less than 1%. The notices that Florida Cellular sent to its shareholders indicate conclusively that the company had actual notice of this rule. *See supra* at 194 [6a]. The Commission's rules and orders also provided notice that applications would be subject to dismissal for failure to comply with the FCC rules and regulations. As the court

stated in *JEM Broadcasting*, Florida Cellular "was entitled to no more than this clear and explicit notice." 22 F.3d at 329. The Commission need not supply a separate "shopping list" specifying that each separate rule violation may lead to dismissal. It is enough that the FCC rules are clearly spelled out and applicants are on notice that their applications are subject to dismissal for failure to comply with these rules.

C. The Commission's Refusal to Grant Florida Cellular a Waiver

Florida Cellular next argues that the Commission abused its discretion when it denied the company's request for a waiver of 47 C.F.R. § 21.922 that would have permitted the company to repurchase Mr. Yandell's shares. Generally, "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action." *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C.Cir. 1968). When such a request is "stated with clarity and accompanied by supporting data, [it is] not subject to perfunctory treatment, but must be given a 'hard look.'" *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C.Cir. 1969). However, a party challenging the Commission's refusal to grant a waiver "must show that the agency's reasons for declining the waiver were 'so insubstantial as to render that denial an abuse of discretion.'" *Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983) (quoting *Sudbrink Broadcasting, Inc. v. FCC*, 509 F.2d 418, 422 (D.C.Cir. 1974)). Furthermore, the FCC rules provide:

> Waivers will not be granted except upon an affirmative showing:
>
> (i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or
>
> (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

47 C.F.R. § 22.19(a)(i)-(ii) (1993).

Florida Cellular argued that the underlying purpose of 47 C.F.R. § 22.922, namely, to prevent speculation in cellular applications, would not be served by applying the rule in this case because Mr. Yandell's multiple ownership interests were acquired inadvertently and the repurchase of his stock was merely an effort to achieve complete compliance with the rules. Opposition to Petition to Dismiss or Deny of JAJ Cellular Partnership, May 24, 1990, at 11-12 [hereinafter "Opposition"]; Request for Waiver of Section 22.922 of the Commission's Rules, April 24, 1990, at 5 [hereinafter "Request"]. The company also argued that the inadvertence with which Mr. Yandell acquired the cross interests would render application of the rule inequitable. Opposition at 12. Finally, the company stated that the waiver would be in the public interest because it would not delay processing of Florida Cellular's application and would expedite the initiation of Block A (non-wireline) cellular service in the Maryland 2 market. Opposition at 12-13; Request at 6-7.

The Commission rejected these arguments. In its original order, the Mobile Services Division simply stated that it would not consider the request for a waiver because the company's arguments in support of a waiver were insufficient to overcome the Commission's strict policy to comply with § 22.921. *See Florida Cellular,* 6 F.C.C.R. at 355. On Florida Cellular's petition for reconsideration, the Commission stated that the company's claim that the violation of § 22.921 was inadvertent did not satisfy either test set out in § 22.19. The Commission first noted that "[Florida Cellular] has made no showing that it took sufficient affirmative steps to ensure that none of its shareholders had filed another application." *Florida Cellular,* 6 F.C.C.R. at 6910. The Commission also found:

> if a fact-specific analysis of intent were required in particular cases[, t]his would slow implementation of service to the public, contrary to the public interest. Moreover, inadvertent rule violations are hardly unique. Waiving rules for inadvertent violations would seriously undercut general compliance and enforcement efforts. Administrative efficiency and fundamental fairness to those who comply with the provisions of this rule mandates stringent compliance.

Id. Finally, the Commission stated:

> waivers of Section 22.922 generally involve cases in which a carrier would technically violate the rule prohibition by its engagement in a legitimate business transaction totally unrelated to the filing of the cellular application, a situation not presented here. . . . The subject case does not present a factual predicate for such a waiver.

Id. Although the Commission did amend its rules to prevent speculation in cellular applications, it also acted to prevent the delay associated with multiple ownership interests and pre-authorization transfers of cellular applications. It is clear from the orders that the Commission refused to grant Florida Cellular a waiver to promote this second rationale. As we have found that "the avoidance of the processing problems and service delays caused by [partial settlements, multiple ownership interests, and pre-authorization transfers] is certainly a permissible reason for the [policy] change," *supra* at 196 [9a], the Commission was justified in relying on this rationale to deny Florida Cellular's petition for a waiver.

The analysis within the Commission's order denying Florida Cellular's petition for reconsideration shows that the Commission did not subject the company's waiver request to "perfunctory treatment." Instead, the Commission considered Florida Cellular's arguments in light of the purposes the FCC rules were designed to serve and concluded that the facts did not present a situation where it would be appropriate to grant a waiver. The Commission found that granting waivers for inadvertent violations would hinder the administrative process and would slow the provision of service to the public. Given the fact that the cellular licensing process was streamlined to prevent the administrative delays that ultimately resulted in service delays, we cannot say that the Commission's reasons for denying the waiver in this case were "so insubstantial as to render that denial an abuse of discretion."

D. Florida Cellular's Due Process Claims

Florida Cellular contends that the Commission denied it due process of law by irrebuttably presuming that the company controls the actions of its shareholders and that the company acted with

speculative intent, and by holding the company vicariously liable for the acts of a shareholder without control. These arguments must also be rejected.

Florida Cellular claims that one due process violation occurred when the Commission denied Florida Cellular a meaningful opportunity to be heard with regard to whether the company had a specific intent to violate the FCC's multiple ownership rules. However, Florida Cellular failed to cite any authority for the proposition that an agency may only act to correct a violation of its rules upon a finding that the party acted with specific intent to violate the rule. This due process argument simply restates in constitutional terms the notice argument that we rejected *supra* at III.B. This claim must fail for the same reasons. *See supra* at 198 [12a-13a]; *see also JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 328-29 (D.C.Cir. 1994).

Florida Cellular contends that another due process violation occurred when the Commission held the company vicariously liable for Mr. Yandell's dual interests. The company argues that it violates due process to hold an entity responsible for a violation unless the entity knew of the violation, participated in it, ratified it, or controlled the actions which resulted in the violation. Nevertheless, the Commission did not find Florida Cellular completely blameless for the violation. At least one notice that the company sent to Mr. Yandell was returned to the company marked "Unable to deliver—no forwarding address." Therefore, the company should have been aware that it had lost contact with Mr. Yandell. It is also undisputed that the company was able to locate Mr. Yandell's proper address when it updated its shareholders list after it won the lottery for the Maryland 2 market. In light of these facts, the Commission could conclude that the company's failure to exercise due diligence in keeping track of its shareholders was at least partly to blame for the rules violation that resulted in the dismissal of Florida Cellular's application.

On a number of occasions this court has found that the Commission could properly require an applicant to show that it acted with due diligence before allowing the applicant to file an amendment to bring a license application into compliance with FCC rules. *See Ponchartrain Broadcasting Co. v. FCC*, 15 F.3d 183, 184 (D.C.Cir. 1994); *Marin TV Servs. Partners, Ltd. v. FCC*, 936 F.2d 1304, 1306

(D.C.Cir. 1993); *Royce Int'l Broadcasting Co. v. FCC*, 820 F.2d 1332, 1336 (D.C.Cir. 1987). We find that, for due process purposes, the Commission may also properly dismiss an application that does not comply with FCC rules when the applicant's lack of due diligence was at least partly to blame for the failure to comply. We therefore reject Florida Cellular's second due process argument.

Finally, Florida Cellular claims that the Commission should not have dismissed its application because Mr. Yandell was not a "party to the application," and therefore the company was not in violation of the multiple ownership rule. The court is foreclosed from considering this argument, however, because Florida Cellular did not raise it before the Commission. *See* 47 U.S.C. § 405 (1988) ("The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order . . . except where the party seeking such review . . . (2) relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."); *see also Russian River Vintage Broadcasting*, 5 F.3d at 1521; *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C.Cir. 1976) ("The Commission must be given a fair opportunity to pass on a novel legal or factual argument, either initially or on a petition for reconsideration, before it can be brought before a reviewing court.") (footnote omitted).

IV. Conclusion

The Commission rules for the nonwireline Rural Service Area licensing process clearly prohibited multiple ownership interests in competing applicants. The Commission's rules and orders also provided adequate notice that applications would be subject to dismissal for failure to comply with the FCC rules. The application that Florida Cellular submitted for the Maryland 2 market did not comply with the FCC's rules prohibiting multiple ownership interests in competing applicants for the same Rural Service Area license. Therefore, because the Commission may properly exercise its discretion to dismiss an application for failure to comply with a clearly stated rule, the Commission's orders dismissing Florida Cellular's application and denying Florida Cellular's petition for waiver are

Affirmed.

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 10854-CL-P-A-89

In re Application of

FLORIDA CELLULAR MOBILE COMMUNICATIONS CORPORATION,

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 468, Maryland 2 (Kent)

Adopted: November 12, 1992; Released: December 1, 1992

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION.

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition for reconsideration filed by Florida Cellular Mobil Communications Corporation (Florida Cellular) in the matter of *Florida Cellular Mobile Communications Corporation*, 6 FCC Rcd 6910 (1991) (*Order*), *aff'g Florida Cellular Mobile Communications Corp.*, 6 FCC Rcd 354 (Mobile Ser. Div. 1991) (*Staff Order*). For the reasons discussed below, we deny Florida Cellular's petition.

II. BACKGROUND

2. On November 22, 1989, Florida Cellular was tentatively selected as the non-wireline winner of a lottery for the Maryland 2 (Kent) RSA. Its application was subsequently dismissed by the Mobile Services Division (MSD) for violating Section 22.921(b)(1) of the Commission's rules, which prohibits an applicant from having

an interest in more than one application for the same Rural Service Area (RSA). The MSD found that one of Florida Cellular's shareholders, Yerger C. Yandell (Yandell), was also a partner in Kudzu Cellular Partnership, a mutually exclusive applicant in the Maryland 2 market. At the same time, the MSD also denied Florida Cellular's companion request for waiver of Section 22.922 of the rules to allow it to amend its application. *Staff Order, supra.* Thereafter, Florida Cellular requested that the *Staff Order* be reconsidered and its application be reinstated, claiming that the MSD had failed to take into account that the rule violation was the product of inadvertence, that the violation was voluntarily disclosed, and that reinstating Florida Cellular's application would have served the policy objectives of the rules. The Commission denied Florida Cellular's request. We pointed out that Florida Cellular's violation of Section 22.921 was undisputed and that the relief requested necessitated waivers of Section 22.921 as well as Section 22.922.[1] The Commission found that a waiver of either rule was unwarranted. Florida Cellular had failed to demonstrate that enforcement of these rules would not serve their underlying purposes or that the facts and circumstances of the violation rendered enforcement of the two rules inequitable, unduly burdensome, or contrary to the public interest. *Order, supra.* Florida Cellular now asks that the Commission reconsider our refusal to reconsider the *Staff Order* and our refusal to reinstate Florida Cellular's application. Florida's petition is opposed by JAJ Cellular Partnership (JAJ), one of its opponents in the earlier proceedings.

III. DISCUSSION

3. In this latest request for reconsideration, Florida Cellular contends that the Commission's action affirming the MSD's decision to dismiss Florida Cellular's application for its still undisputed violation of the cross-ownership rule was based upon flawed legal and factual premises that warrant reversal. In addition, Florida Cellular submits that the Commission's action, if allowed to stand, will make applicants and licensees reluctant to disclose violations voluntarily for fear of disqualification.

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[1] Section 22.922 prohibits transfers and assignments of RSA applications prior to grant of construction authorization.

4. Florida Cellular argues that neither the staff nor the Commission acknowledged that Florida Cellular voluntarily disclosed its violation of Section 22.921, and that this lack of acknowledgement thereby implied that the violation was brought to light by either JAJ's petition or the MSD staff's own research. This, says Florida Cellular, renders the revocation inconsistent with established Commission policy of mitigating sanctions imposed on a licensee who voluntarily disclosed a violation. Florida Cellular next argues that the Commission failed to uphold the public interest by overlooking allegations that JAJ sought a $5 million payoff for not opposing Florida Cellular's petition for reconsideration of the *Staff Order*. Florida Cellular also asserts that the Commission improperly applied Section 22.921 because we failed to consider the absence of specific intent by Yandell or Florida Cellular to avoid the cross-ownership restriction.

5. Florida Cellular argues that the *Order* conflicts with the analyses of Section 22.921 employed in previous cases. Florida Cellular notes that the only other recent decision in which the Commission applied Section 22.921 is *Progressive Cellular III B-3 (Progressive)*,[2] but in that case the applicant was a general partnership and the violation of the cross-ownership rule occurred because the second partnership's managing partner, acting in his official capacity, filed a competing application. Florida Cellular asserts that, as a corporation, it was not responsible for the actions of its shareholders. In addition, says Florida Cellular, the persons responsible for the rule violation in *Progressive* jointly held a majority interest and one was the managing partner of the applicant, whereas Florida Cellular's rule violator was an 0.85 percent shareholder who had no indicia of control. Finally, Florida Cellular contends that the Commission in the *Order* did not assert any basis for our attribution of Yandell's ownership to Florida Cellular. This, Florida Cellular concludes, warrants a different result than *Progressive*, which was based on the joint and mutual responsibility of partners for their rule violation. Florida also cites *Telephone and Data Systems, Inc. (TDS)*, 6 FCC Rcd 270 (Com. Car. Bur. 1991) (application for review pending), in which the Common Carrier Bureau (Bureau) found a violation of Section 22.921 stemming from an applicant's acquisition of interest in competing applications through a separate, non-applicant corpora-

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[2] *Progressive Cellular III B-3*, 6 FCC Rcd 7178 (1991), *aff'g* 6 FCC Rcd 596 (Mobile Ser. Div. 1991).

tion in which it held a 49 percent interest, but did not dismiss the application. Florida Cellular contends that the Bureau took this action because revocation would have been inequitable, the action taken by the third party was beyond TDS's control, and there was no indication that TDS had intended unfairly to skew the lottery. Consequently, argues Florida Cellular, under the TDS analysis, its application should not have been dismissed. Florida Cellular's final argument is that the Commission failed to give Florida Cellular's request for waiver the "hard look" required by *WAIT Radio v. FCC*.[3] Instead, says Florida Cellular, the Commission refused to consider whether the facts justified a waiver.

6. None of Florida Cellular's arguments is persuasive. It has failed to demonstrate, as alleged, that the decision reached in the Order was based on "flawed legal and factual premises". Most of the positions taken by Florida Cellular were previously considered and rejected and the remainder are equally unavailing.

7. Its first argument, that the Commission failed to acknowledge that Florida Cellular voluntarily disclosed its violation of Section 22.921, is patently in error.[4] Likewise, there is no substance to its allegation of an implication that the violation was brought to light through the efforts of either the Commission or JAJ.[5] As the *Order* explained, Florida Cellular's application was dismissed because it violated the Commission's cross-ownership rule and it failed to provide an adequate demonstration that enforcement of the rule should be waived. There is no validity to Florida Cellular's claim that it should not be found in violation of the cross-ownership prohibition because it did not intend to abuse the lottery process. Although deterring speculation is one purpose of Section 22.921, its underlying intent is to assist the Commission in processing applications quickly and efficiently so that service might be available to the

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[3] *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[4] Florida Cellular's disclosure of its rule violation was acknowledged by the Commission. *See Order*, 6 FCC Rcd 6910 at para. 4.

[5] Interestingly, Florida Cellular conveniently overlooks the fact that it was legally bound by Sections 1.65 and 22.923(b)(7) of the rules to disclose Yandell's prohibited, dual interest.

public as expeditiously as possible. As the Commission stated in the *Order at 6910, para. 5:*

> A rule such as Section 22.931 could not be efficiently applied if a fact-specific analysis of intent were required . . . .

The Commission's enforcement of the cross-ownership restriction without regard to intent of the violator is neither new nor novel. *See Progressive, supra,* and *MV Cellular, Inc.*, 103 FCC 2d 414, 420 (1986). Also in error is Florida Cellular's assertion that we were compelled by precedent to mitigate the consequences of Florida Cellular's violation because it was voluntarily disclosed. Although the Commission will consider voluntary disclosure as mitigating factor when assessing forfeitures, we have determined that a dismissal, rather than monetary forfeiture, is the appropriate remedy for Florida Cellular's violation of the cross-ownership prohibition. *See Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *on recon.*, FCC 92-212, adopted May 14, 1992. Furthermore, in view of Florida Cellular's failure to exercise due diligence in its attempt to comply with the rule, we do not find that Florida Cellular's subsequent disclosure is sufficient cause to warrant mitigation.

8. Although Florida Cellular did not explicitly request that Section 22.921 be waived, the Commission nevertheless gave Florida Cellular's claim the "hard look" required by *WAIT Radio v. FCC,* supra, and found the asserted basis for waiver insufficient. Florida Cellular's violation of Section 22.921 apparently stemmed from its failure to inform Yandell that it intended to file applications for various RSA lotteries. Our rule requires applicants to avoid cross-ownership interests; it does not exempt those who file multiple applications and fatally err by not diligently tracking their assorted potential cross-interests. Indeed, in this case the record reveals that Florida Cellular reached Yandell when it won the lottery, which suggests that it could have done so earlier to avoid a cross-ownership violation. We need not base our decision on that suggestion, however. The absolute legal prohibition of Section 22.921 against cross-ownership interests explicitly includes indirect interests of less

than 1 percent.[6] Nothing in Florida Cellular's petition, including its claim of inadvertence, lends credence to its assertion that it warranted a *sua sponte* waiver, or should have been granted a waiver on reconsideration.[7]

IV. CONCLUSION

9. The issues raised by Florida Cellular in its petition for reconsideration of the *Order* have been fully and carefully examined and no reversible error has been found.

V. ORDERING PARAGRAPH

10. Accordingly, IT IS ORDERED THAT the petition for reconsideration filed by Florida Cellular Mobil Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[6] Florida Cellular's reliance on *Progressive* is misplaced. Florida Cellular's corporate purpose was to acquire cellular radio licenses in Metropolitan Statistical Areas. This constitutes notice to all stockholders that other applications for cellular authorizations could be forthcoming. Florida Cellular's registered purpose to file cellular applications, its responsibility to keep its stockholders advised of matters that could lead to violation of Section 22.921, and Yandell's responsibility to comply with Section 22.921 each establish a duty which, with reasonable exercise of diligence, could have avoided violation of Section 22.921 and application dismissal. As to *TDS*, that case, which is currently before the Commission on review, involved a wireline settlement.

[7] Florida Cellular's claim of extortion by JAJ represents a matter unrelated to the issues before us, namely, waiver of Sections 22.921 and 22.922. This should not, however, be interpreted to mean that the Commission is not concerned about "greenmail" petitions. It is currently exploring possible rule changes, not applicable during the time frame at issue here, to prevent parties from filing petitions solely to extract money from an applicant or to delay an applicant and thus force a settlement. *Amendment of Part 22 of the Commission's Rules For Unserved Areas* (Further Notice of Proposed Rule Making), 6 FCC Rcd 6158 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 10854-CL-P-468-A-89

In re Application of

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 468, Maryland 2 (Kent)

Adopted: November 12, 1991; Released: November 22, 1991

MEMORANDUM OPINION AND ORDER

By the Commission:

I. INTRODUCTION

1. In this order, we address a petition for reconsideration filed by Florida Cellular Mobil Communications Corporation (Florida) in the matter of *Florida Cellular Mobil Communications Corporation*, 6 FCC Rcd 354 (Mob. Serv. Div. 1991) (Order).[1] For the reasons discussed below, we deny Florida's petition.

II. BACKGROUND

2. On November 22, 1989, Florida was tentatively selected as the non-wireline winner of a lottery for the Maryland 2 (Kent) RSA.[2] JAJ Cellular Partnership (JAJ) filed a petition to deny, alleging that

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[1] The subject petition for reconsideration has been referred to us by the Chief, Common Carrier Bureau, pursuant to 47 C.F.R. §§ 1.104(b), 1.106(l).

[2] *See* Public Notice Report No. CL-90-51 (released November 24, 1989).

Florida had violated Section 22.921(b)(1) of the Commission's rules, which prohibits an applicant from having an interest in more than one application for the same Rural Service Area (RSA).[3] The Mobile Services Division (MSD) found that one of Florida's shareholders, Yerger C. Yandell, was also a partner in Kudzu Cellular Partnership, a mutually exclusive applicant in the Maryland 2 market. Consequently, the MSD dismissed Florida's application for its violation of Section 22.921(b)(1). The MSD also denied a companion request by Florida for waiver of Section 22.922 of the rules to allow Yandell to divest his holdings in Florida.[4] *Order, supra* at para. 5. Florida now asks that the MSD's action be reconsidered and its application be reinstated.[5] Its petition is opposed by JAJ and Vincent T. Ridikas (Ridikas).[6]

III. DISCUSSION

3. Florida reiterates its previous statements that Yandell, an 0.85% shareholder, failed to receive mailed notification of Florida's plan to pursue RSA authorizations and that Florida did not know that Yandell subsequently made a small investment in Kudzu. Florida adds that it disclosed to the Commission what Yandell had done and requested remedial waivers. Nevertheless, says Florida, the MSD determined that Florida had violated the Commission's cross interest requirements and dismissed its application.

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[3] Section 22.921(b)(1) provides, in pertinent part that "[f]or Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent."

[4] Section 22.922 provides, in pertinent part that ". . . the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited. . . ."

[5] Kudzu's application was also dismissed. Kudzu, however, has not sought reconsideration of that action.

[6] Ridikas, like JAJ, was an applicant for the Maryland 2 market. *See* Lottery Notice, Mimeo No. 4350, released September 22, 1989 (Fee No. 9282603). Being a competing applicant whose application would be included in a re-lottery for the Maryland 2 market affords Ridikas standing to participate in this proceeding. *See* Cell South, 2 FCC Rcd 1249 (1987).

4. Florida now argues that the *Order* mistakenly assumes that the MSD does not have authority to waive the Commission's cellular rules and allow correction of defects that existed in an application on the day of filing. Because of this misconception, Florida says, the MSD failed to take into consideration that the violation was the product of inadvertence, that Florida voluntarily disclosed the violation, or that the action Florida proposed would have served the policy objectives of the rules. Had the MSD done so, submits Florida, it would have found a compelling basis for allowing Yandell to divest his interest in Florida. Instead, Florida argues, the *Order* simply found that no corrective action by the Commission could alter the fact that Yandell violated Section 22.921 and that Florida's application, therefore, was fatally defective under Section 22.20.[7]

5. At the outset, we observe that Florida does not dispute that it violated Section 22.921, and we support the MSD's finding in this regard. The relief requested by Florida necessitates waivers of both Section 22.921 and Section 22.922 of the Commission's rules. Section 22.19 of the Commission's rules establishes the standard applicants must satisfy in order to be granted waivers. Specifically, the rule states that waivers will not be granted except upon a showing that either: (a) the underlying purpose of the rule will not be served, or would be frustrated and that grant of the waiver is in the public interest; or (b) the unique facts and circumstances of the case render application of the rule inequitable, unduly burdensome or contrary to the public interest, and no reasonable alternative is available. *See Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *see also WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Florida's claim that its violation of Section 22.921 was inadvertently committed by a minority shareholder does not meet either of these two tests. While Florida itself may not have acted intentionally to skew its chances in the lottery, it has made no showing that it took sufficient affirmative steps to ensure that none of its shareholders had filed another application. A rule such as Section 22.921 could not be efficiently applied if a fact-specific analysis of intent were required in particular cases. This would slow implementation of service to the public, contrary to the public interest.

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[7] Section 22.20(a)(2) provides, in pertinent part, that "[A]n application will be unacceptable for filing and will be returned . . . if . . . [it] does not comply with the Commission's rules. . . ."

Moreover, inadvertent rule violations are hardly unique. Waiving rules for inadvertent violations would seriously undercut general compliance and enforcement efforts.[8] Administrative efficiency and fundamental fairness to those who comply with the provisions of this rule mandates stringent compliance. Likewise, Florida did not satisfy the requirement of Section 22.19 with respect to its request for a waiver of Section 22.922. We note that Section 22.922 is not to be used as a device to escape the consequences of our consistent policy of adherence to the cross-interest prohibition. Moreover, waivers of Section 22.922 generally involve cases in which a carrier would technically violate the rule prohibition by its engagement in a legitimate business transaction totally unrelated to the filing of the cellular application, a situation not presented here. *See Limited Transfers and Assignments of Applications in Rural Service Areas*, 5 FCC Rcd 3265 (1990). The subject case does not present a factual predicate for such a waiver.

IV. CONCLUSION

6. We are not persuaded that the MSD erred in its decision to deny waivers of Sections 22.921 and 22.922 of the rules or in its dismissal of Florida's application. These decisions were consistent with Commission rules and policy. In sum, we affirm the MSD's action taken in the *Order*.

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[8] Ownership as used in Section 22.921(b)(1) is a "general term of recognition of the fact that ownership can vary in degree and kind in different contexts." Algreg Cellular Engineering, 6 FCC Rcd 2921, 2925 (Com. Car. Bur. 1991). We note that the Commission intended to prevent *any* interest, "including . . . less than one percent," by one party in more than one application for an RSA. *See* n.3, *supra*. Cf. Sections 22.921(a) and (b)(1), which permit up to one percent cross-interests in MSAs.

V. ORDERING PARAGRAPH

7. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed by Florida Cellular Mobil Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. 10854-CL-P-468-A-89

In re Application of:

FLORIDA CELLULAR MOBILE COMMUNICATION CORPORATION

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 468, Maryland 2 (Kent)

Adopted: January 14, 1991; Released: January 18, 1991

MEMORANDUM OPINION AND ORDER

By the Chief, Mobile Services Division:

1. JAJ Cellular Partnership (JAJ) has filed a Petition to Dismiss or Deny (Petition) against Florida Cellular Mobile Communications Corporation (Florida), the tentative selectee in the above-referenced RSA. JAJ alleges that a Florida shareholder holds an interest in another application for the same market and that Florida's ownership disclosures are inadequate and inconsistent. Florida requests a waiver of Section 22.922 of the rules which prohibits transfer of cellular interests prior to a grant. We have reviewed the record and we find Florida's application violates Section 22.921(b) of the Commission rules forbidding any party to hold an interest in more than one non-wireline cellular application in a single RSA market.

I. BACKGROUND

2. Florida is the tentative selectee for the Maryland 2 (Kent) RSA.[1] On May 14, 1990, JAJ filed a Petition to Deny against

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[1] *See* Public Notice Report No. CL-90-51 (released November 24, 1989).

Florida, alleging that Yerger C. Yandell, a shareholder in Florida, also holds a five percent interest in Kudzu Cellular Partnership (Kudzu). Kudzu is also an applicant for a nonwireline authorization in the Maryland 2 market. Although Florida requests a waiver of Section 22.922 of the Commission's rules to allow Mr. Yandell to divest his interest in Florida, JAJ urges the Commission only to consider the application as originally filed. Otherwise, JAJ argues, applicants would be allowed to amend their applications in violation of Section 22.921(b)(1), which prohibits any party from holding an interest in two RSA applications for the same market, negating the meaning of the rule. JAJ also alleges that Florida's waiver request lacks adequate evidentiary support as required by Section 22.19 of the Commission's rules, and that sale of Yandell's ownership to Florida may allow Yandell to profit from his wrongdoing. JAJ asserts that Florida provided no affidavits from Yandell to substantiate the claims underlying the waiver request. Finally, JAJ alleges that Florida's application fails to name its corporate directors, makes unexplained ownership information changes in an amendment, and does not explain certain relationships among its shareholders.

3. In its Opposition, Florida concedes that Yandell simultaneously held interests in two applications for the Maryland 2 market. In its April 24, 1990 Request for a Waiver of Section 22.922, Florida asserts that Mr. Yandell originally purchased his shares in Florida when Florida was intending to file applications only in seven Metropolitan Service Areas (MSA). No MSA applications were ever filed by Florida, however. Accordingly, Florida alleges, Yandell "wrote off" his investment and later moved without informing Florida. Florida sent notices to all shareholders of annual meetings and other matters including possible litigation with a shareholder over Florida's failure to file in any MSAs. Florida alleges that at least one of these notices was returned to it as undeliverable. In its settlement with the complaining shareholder, Florida agreed to file in 125 Rural Service Areas (RSA). Maryland 2 (Kent) was one of these markets. In the meantime, Yandell, who according to Florida thought Florida no longer existed, acquired an interest in Kudzu, which also filed an application in Maryland 2 (Kent). Florida therefore requests permission, through a waiver of Section 22.922, to allow Yandell to divest his interest in Florida in order to bring Florida's application into compliance with the rules. Florida states that it is willing to accept whatever terms the Commission may impose on the transfer

of Yandell's interest in Florida so that Yandell does not profit from his prohibited interest in the two applications. Florida also concedes that its application, as originally filed, contained several minor errors in shareholder information. It argues that these errors were properly corrected in a timely-filed amendment and, in any case do not warrant dismissal of its application.

II. DISCUSSION

4. Section 22.921 of the Commission's rules[2] prohibits any party from holding an interest in two applications for the same RSA market. The fact that Yandell did violate this provision is uncontroverted. However, Florida argues that Yandell should be allowed to transfer his shares to correct the violation. No corrective action by the Commission can alter the fact that Florida's application, at the time it was filed, was defective. In the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission amended Section 22.921 to forbid *any* ownership in more than one application for the same RSA market, specifically superseding the earlier prohibition against multiple ownership interests exceeding one percent for MSA markets. This action demonstrates the importance the Commission has placed on disallowing all multiple ownership interests. Section 22.20 of the Commission's rules provides that an application will be returned to the applicant as unacceptable for filing if the applicant fails to comply with the Commission's rules.[3] Florida's application violated the prohibition against a party having ownership interests in more than one application in a market. We find no compelling public

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2 Section 22.921 of the Commission's rules states in pertinent part:

(b) . . . For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. . .

3 Section 22.20 of the Commission's rules states in pertinent part:

(a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant . . . if:

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

interest justification for determining that Florida or Yandell should not be required to comply with Section 22.921. Accordingly, Florida's application will be returned as defective. Yandell also held an interest in Kudzu when the Florida application was filed, which renders the Kudzu application for the Maryland 2 (Kent) cellular authorization defective at the time it was filed.[4] Therefore, the Kudzu application will also be returned as defective.

5. Florida's arguments in support of its waiver to permit transfer of Yandell's interest in Florida are not sufficient to overcome the Commission's strict policy to comply with Section 22.921. Having found Florida's application defective, the Commission will not consider Florida's waiver request to allow Yandell to transfer his interest. *See generally,* Letter from Gregory J. Vogt to Henry A. Solomon (May 2, 1990 Reference No. 63500-LD). A defective application may not be amended after the filing date or the lottery date to bring it into compliance with the Commission's rules. *Rem Communication,* 3 FCC Rcd 3705 (1988). Because we have found Florida's application defective for this violation, we do not need to address JAJ's other arguments.

III. CONCLUSION AND ORDERING PARAGRAPHS

6. For the reasons set forth herein, we find that Florida Cellular Mobile Communication Corporation has filed a defective application in violation of Section 22.922 of the Commission's rules.

7. Accordingly, IT IS ORDERED that Petition to Dismiss or Deny filed be JAJ Cellular Partnership IS HEREBY GRANTED.

8. IT IS FURTHER ORDERED that the application of Florida Cellular Mobile Communication Corporation, File No. 10854-CL-P-468-A-89, IS HEREBY DISMISSED.

9. IT IS FURTHER ORDERED that the request for a waiver of 47 C.F.R. Section 22.921 filed by Florida IS HEREBY DISMISSED as moot.

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[4] Florida did not file an application for the Connecticut 2 market and, therefore, Kudzu's award in Connecticut 2 is unaffected by this decision.

10. IT IS FURTHER ORDERED that the application of Kudzu Cellular Partnership for RSA market No. 468A IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

United States Court of Appeals

For the District of Columbia Circuit

No. 92-1664 September Term, 1994

Florida Cellular Mobil Communications Corporation,
Appellant,

v.

Federal Communications Commission,
Appellee

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED SEP 28 1994
RON GARVIN
CLERK

BEFORE: Sentelle, Circuit Judge, and MacKinnon, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing, filed August 29, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /S/
ROBERT A. BONNER
DEPUTY CLERK

United States Court of Appeals

For the District of Columbia Circuit

No. 92-1664 September Term, 1994

Florida Cellular Mobil Communications Corporation,
Appellant,

v.

Federal Communications Commission,
Appellee

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED SEP 28 1994
RON GARVIN
CLERK

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsberg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

Appellant's Suggestion for Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /S/
ROBERT A. BONNER
DEPUTY CLERK

MANDATE Pursuant to the provisions of Fed. R. App.Pro.41(a)	
Issued:	11/7/94
By:	/s/ E. Brown , Deputy Clerk
Attached:	___ Amending Order ___ Opinion Order on Costs

United States Court of Appeals

For the District of Columbia Circuit

No. 92-1664 September Term, 1993

Florida Cellular Mobil Communications Corporation,
Appellant,

v.

Federal Communications Commission,
Appellee

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED JUL 15 1994
RON GARVIN
CLERK

APPEAL OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: **Mikva**, Chief Judge, **Sentelle**, Circuit Judge, and **MacKinnon**, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the record under review for an order of the Federal Communications Commission and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the order under review is affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /S/
ROBERT A. BONNER
DEPUTY CLERK

Date: July 15, 1994

Opinion for the Court filed by Senior Circuit Judge MacKinnon

ARGUED MAY 10, 1994; DECIDED JULY 15, 1994

In the United States Court of Appeals
for the District of Columbia Circuit

No. 92-1664

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

WENDY C. COLEMAN d/b/a WCC CELLULAR, *et al.*,
Intervenors.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Florida Cellular Mobil Communications Corporation ("Florida Cellular") hereby petitions for rehearing of the decision of the panel in this case, *Opinion* (issued July 15, 1994), and suggests that rehearing be granted *in banc*.

CONCISE STATEMENT OF ISSUES AND THEIR IMPORTANCE

The panel's decision in this case warrants rehearing *in banc* to address the following three issues:

1. The decision is a case of first impression in holding a corporation vicariously responsible to the FCC for the independent acts of a non-controlling passive shareholder.

2. The decision conflicts with prior case law of this Circuit, *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987); *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985); *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968), which permits the FCC to dismiss

applications summarily only if it has given clear notice of the requirements that must be satisfied to avoid dismissal.

3. The decision affirms an FCC decision denying a waiver because of the delay in licensing that would result from considering a waiver request, thereby conflicting with prior case law of this Circuit, *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), and *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), concerning the FCC's consideration of waiver requests, and with case law of the United States Supreme Court, *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962), requiring a rational connection between the facts found and the choice made.

Appellant submits that rehearing *in banc* is warranted because of the importance of these issues. First of all, this is a case of first impression. The panel's decision represents the first time this Court has held that an otherwise qualified corporation seeking an FCC license can have its application dismissed solely on the basis of the independent acts of its passive, non-controlling shareholder, which the corporation could not have prevented, and about which the corporation had no knowledge.

This will be an issue of considerable consequence in the future, because the FCC increasingly uses strict tests for applicant eligibility and application acceptability, many of which could result in a corporate applicant becoming ineligible or otherwise being subjected to disqualification or dismissal due to the status or acts of non-controlling shareholders outside the supervision or control of a corporate applicant. In light of the Supreme Court case law regarding the constitutional limits on the vicarious liability of corporations in a variety of other contexts,[1] and the likelihood that this issue will be involved in future cases, this issue should be considered by the Court *in banc*.

Second, the panel's decision effectively eliminates the important protections against arbitrary and capricious agency action afforded by the *Radio Athens-Salzer-Satellite Broadcasting* line of cases and the

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[1] *E.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. Park*, 421 U.S. 658 (1975).

more recent *McElroy* decision. These cases require the FCC to give clear notice, when it adopts rules that will result in the dismissal of noncompliant applications, of the requirements that must be met to avoid dismissal. Applicants can only be held responsible for meeting requirements that would be apparent from a fair reading of the rule. The panel's decision conflicts with these decisions, in that it holds that the FCC need not give specific notice of which rules are subject to the policy of strict enforcement through dismissal. The panel's decision also conflicts with these decisions because it affirmed an FCC decision that held Appellant responsible for violating a requirement, not apparent through a fair reading of the rule, that first surfaced ten months after the dismissal, when the agency interpreted the rule upon denying reconsideration. The panel's decision eliminates the protections against arbitrary decisions afforded by the cited case law and effectively reverses these decisions.

Finally, the panel's decision also upholds, for the first time, an FCC decision that effectively holds a rule to be unwaivable. The FCC based its denial of the waiver on the ground that considering waivers is too time-consuming and inconvenient, resulting in delays in licensing. This is contrary to long-established case law holding that principled consideration of waivers is essential to the FCC's regulatory scheme, to ensure that its decisions are in the public interest. The decision also violates a central tenet of administrative law: that there must be a rational connection between the facts and the agency's decision.

REASONS FOR GRANTING REHEARING *IN BANC*

I. THE FCC VIOLATED DUE PROCESS OF LAW WHEN IT DISMISSED A CORPORATION'S APPLICATION BECAUSE OF AN UNINTENTIONAL OWNERSHIP VIOLATION BY A NON-CONTROLLING SHAREHOLDER, WITHOUT ANY NOTICE THAT A CORPORATION IS VICARIOUSLY LIABLE FOR SHAREHOLDERS' VIOLATIONS AND MUST EXERCISE DILIGENCE REGARDING SHAREHOLDERS' OTHER INVESTMENTS

The panel's decision is the first case in which the Court has affirmed an FCC decision that holds a corporation vicariously liable for the acts of a shareholder who had no attributes of control, and over whom the company has no control. It will likely not be the last, however.

Careful attention to this issue is warranted because the FCC's casual assertion of corporate responsibility for shareholders' acts in this case represents the way the agency will be approaching hundreds of decisions regarding the eligibility of corporations for a multitude of licenses.[2] In this case, the FCC's unprecedented decision to hold

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[2] For several thousand licenses in the new Personal Communications Service, the FCC has complex rules governing the attribution to a corporation of shareholders' interests in other licenses. A company's eligibility for licenses depends on what other licenses it holds as well as the licenses in which its 5% and greater shareholders hold "attributable" interests. A company which holds, or whose 5% shareholders hold, a 20% interest in certain cellular licenses is eligible only for a single 10 MHz license in the vicinity of the cellular system. A company not subject to this limitation is eligible for licenses totaling up to 40 Mhz in a market, but the FCC charges toward this total any licenses applied for by companies in which any 5% shareholder has a 5% interest. *See New Personal Communications Services*, Gen. Docket 90-314, *Memorandum Opinion and Order*, FCC 94-144 at ¶¶ 98-100, §§ 24.204, 24.229(c) (June 13, 1994), 59 Fed. Reg. 32,830 (June 24, 1994), *Further Order on Reconsideration*, FCC 94-195 (July 22, 1994), *reconsidering Second Report and Order*, 8 FCC Rcd. 7700, 7745-46, 7728 (1993). Moreover, the FCC has recently adopted a decision (not yet released) imposing a 45 MHz cap on the total amount of spectrum in several different services that may be attributably held (pursuant to rules not yet available) by a single company. *Commercial Mobile Radio Services*, Gen. Docket 93-252, *third Report and Order*, FCC 94-212 (adopted August 9, 1994). Thus, the eligibility of corporations to hold a wide variety of licenses will

Appellant responsible for the investment by Yandell, an 0.85% shareholder, in another applicant denied the innocent shareholders owning 99.15% of the company the benefit of a license worth at least $40 million and perhaps twice that, or more. In the decisions that follow in its wake, billions of dollars may be at stake.

The reason why there are no reported decisions upholding FCC actions imposing vicarious corporate liability for violations of ownership rules due to the independent actions of non-controlling shareholders is that the FCC has not enforced its broadcast ownership rules through disqualification or dismissal of the corporation's applications or revocation of its licenses.[3] While the FCC has reserved the right to take action against corporate applicants and licensees, it has generally proceeded by "order[ing] individual stockholders to divest themselves of violative holdings." *Attribution of Ownership Interests*, 97 F.C.C. 2d 997, 1033 (1984) (citing cases). Thus, when a broadcaster who exceeds the cross-ownership or multiple ownership limits due to non-controlling shareholders' other investments seeks to acquire an additional station, the FCC does not disqualify the corporation and dismiss the application; instead, it typically grants temporary waivers of those rules, grants the license application, and pursues a separate proceeding against the violative shareholder. *See, e.g., Pinelands, Inc.*, 7 FCC Rcd. 6058 (1992), *appeal dismissed sub nom. Garden State Broadcasting Limited Partnership v. FCC*, No. 91-1043 (D.C. Cir. June 29, 1993).

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be determined by the independent actions of shareholders who neither control them nor are responsible to them.

[3] There have been very few cases involving cellular license applications decided by the FCC, none of which resulted in a published opinion of the court; moreover, all of the previous FCC decisions holding a cellular applicant liable for its owners' ownership violations involved parties with indicia of control, such as general partnership interests, management positions, or very substantial ownership. *See Progressive Cellular III B-3*, 6 FCC Rcd. 7178 (1991), *aff'd mem. sub nom. Progressive Cellular III B-3 v. FCC*, 986 F.2d 546 (D.C. Cir. 1993) (table); *Petitions for Reconsideration of the Return of Round IV Cellular Applications*, 103 FCC 2d 414 (1986). Similarly, the dismissal of cellular applications because of alien ownership involved applicants that were originally general partnerships. *See Moving Phones Partnership L.P. v. FCC*, 998 F.2d 1051, 1057 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994).

In these cases, the FCC has followed that approach "to protect the innocent shareholders who had not created the problem and best serve the public interest." *BTMI, Inc., Receiver*, 9 FCC Rcd. 2856, 2858 (June 24, 1994). In the present case, the FCC had no such regard for the effect of its decision on the innocent shareholders; it destroyed the value of their investment in Appellant in disregard of due process of law.

The Supreme Court has addressed the constitutional implications of imposing vicarious liability on corporations as the issue has come up in a variety of cases. To impose criminal liability on a corporation, it requires that the corporate agents have a "responsible relationship" to the violation, limiting liability to "persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of." *United States v. Park*, 421 U.S. 658, 671 (1975). When the defendant is powerless to prevent or correct the violation, no criminal liability is warranted. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964).

In civil forfeiture cases the Supreme Court has upheld forfeitures against due process challenge only where the forfeiting party has some level of involvement, knowledge, or control over the evil to be combatted. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court noted that

> it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the prescribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90 (footnote and citations omitted).

In a long line of due process cases involving strict liability laws, the Supreme Court has found imposition of liability on innocent parties to be rationally related to deterrence goals when the party

made liable had some measure of control over the evil to be deterred.[4] However, it has always required that the imposition of such liability be associated with a capacity to prevent the harm involved.[5] The rationale common to all these cases is that a party may be subjected to liability only if it has the ability to control the evil to be deterred.

The FCC's holding Appellant responsible for an ownership violation by its shareholder, Yandell, is flawed because Appellant had neither knowledge, participation, ratification, or control over Yandell's investment decisions. Appellant was "uninvolved in and unaware of" Yandell's interest in another applicant, *see Calero-Toledo*, 416 U.S. at 689, and it could not have stopped him from making the investment.

The panel's decision (slip op. at 17-18) addresses the issue as follows:

> [T]he Commission did not find Florida Cellular completely blameless for the violation. At least one notice that the company sent to Mr. Yandell was returned to the company marked "Unable to deliver—no forwarding address." Therefore, the company should have been aware that it had lost contact with Mr. Yandell. It is also undisputed that the company was able to locate Mr. Yandell's proper address when it updated its shareholders list after it won the lottery for the Maryland 2 market. In light of these facts, the Commission could conclude that the company's failure to exercise due diligence in keeping track of its shareholders was at least partly to blame for the rules violation that resulted in the dismissal of Florida Cellular's application.
>
> On a number of occasions this court has found that the Commission could properly require an applicant to show that it acted with due diligence before allowing the applicant to

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[4] *See, e.g., Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *P.F. Peterson Baking Co. v. Bryan*, 290 U.S. 570 (1934).

[5] *See, e.g., Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924); *St. Louis & San Francisco Railway v. Matthews*, 165 U.S. 1 (1897); *Chicago v. Sturges*, 222 U.S. 313 (1911); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

> file an amendment to bring a license application into compliance with FCC rules. *See Ponchartrain Broadcasting Co. v. FCC*, 15 F.3d 183, 184 (D.C. Cir. 1994); *Marin TV Servs. Partners, Ltd. v. FCC*, 936 F.2d 1304, 1306 (D.C. Cir. 1993); *Royce Int'l Broadcasting Co. v. FCC*, 820 F.2d 1332, 1336 (D.C. Cir. 1987). We find that, for due process purposes, the Commission may also properly dismiss an application that does not comply with FCC rules when the applicant's lack of due diligence was at least partly to blame for the failure to comply. We therefore reject Florida Cellular's second due process argument.

This holding is deficient for several reasons:

(1) The FCC made no factually-based finding regarding the extent or lack of Appellant's "due diligence."[6] Florida Cellular did not have an opportunity to demonstrate its due diligence (to the extent it is relevant) because the first notice it was given that its diligence might be decisionally relevant was when the FCC denied reconsideration of the application dismissal, when it said Appellant "has made no showing that it took sufficient affirmative steps to ensure that none of its shareholders had filed another application."[7] (A. 8.)

(2) The FCC did *not* consider Appellant's supposed lack of diligence as a basis for holding Appellant responsible for the ownership violation; it considered that factor solely as a factor weighing against waiver of the rule. (A. 6, 8.)

(3) The record, such as it is, reflects that Appellant did, in fact, exercise considerable diligence. It mailed notices to its shareholders, including Yandell, periodically over the course of several years (*see*

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[6] The FCC cited no rule or requiring cellular applicants to track the investments of their shareholders, and there is none. (A. 6, 8.) For that reason, Applicant's "due diligence" was not in issue, and Appellant did not have any reason to build a factual case in support of its diligence. Thus, the FCC *did not find and could not have found*, based on substantial evidence, that Appellant failed to exercise any required level of diligence. There simply is no record on which to make a finding.

[7] In fact, Appellant made no such showing (assuming that *any* applicant could make a showing satisfying the FCC's unannounced and changing standard), because it was not required to make any such showing.

A. 40-41), including several in 1988 (A. 157-72). Those notices included one informing the shareholders that the FCC had adopted the rule against cross-ownership (A. 160-64). Yandell had moved in 1984 without informing Appellant, but that letter, dated May 4, 1984, was not returned by the post office. In fact, none of these letters was returned by the post office, except one dated August 2, 1988, after the application filing process was underway (A. 46, 169-72). Thus, Appellant had every reason to believe that Yandell had received all of the mailings sent out before applications were filed. Moreover, the fact that one letter was returned as undeliverable by the Chicago post office imposed no obligation on Appellant to determine Yandell's new address and investigate his investment strategy. There simply is no basis, on the record, for any finding other than that Appellant took reasonable steps to keep its shareholders informed. It did not take extraordinary steps, such as immediately seeking to determine Yandell's new address, because it had no legitimate and prudent to do so.[8]

(4) Even if Appellant had stayed in close contact with each of its shareholders, it did not have the power to deter the shareholders from investing in other cellular applicants.

A corporation cannot reasonably be expected to do any more than Florida Cellular did here. Corporations are not ordinarily liable for the acts of their shareholders. Even the FCC's own broadcast case law does not hold a corporate licensee responsible for ownership violations by non-controlling stockholders, and neither the FCC rule

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[8] The panel's decision apparently concluded from the fact that Appellant was able to obtain Yandell's new address after winning the lottery that Appellant should have done so as soon as the August 2, 1988 letter to Yandell was returned by the post office. (Slip op. at 18.) Appellant's effort to update its mailing list was prompted, by its counsel's instructions to do so in preparation for filing a post-lottery amendment updating any information that had changed in the preceding two years, as well as the understandable desire to tell the shareholders the good news about the lottery results, which caused their previously worthless investments to suddenly take on substantial value. (A. 42, 133.) While the record does not indicate how Appellant ultimately obtained Yandell's address, undersigned counsel has been informed that an official of Appellant had a chance meeting with Yandell at the time when the company was seeking to update its records.

at issue, 47 C.F.R. § 22.917(b),[9] nor FCC cellular case law, so requires. Under these circumstances, the dismissal of Appellant's application served no legitimate purpose and denied the company due process of law.

II. THE FCC'S DISMISSAL OF AN APPLICATION AS UNACCEPTABLE FOR FILING CANNOT BE SUSTAINED WHEN THE AGENCY GAVE NO NOTICE, BEFORE THE APPLICATION WAS FILED, THAT IT REQUIRED STRICT COMPLIANCE WITH AN UNANNOUNCED INTERPRETATION OF THE MULTIPLE OWNERSHIP RULE

The panel's decision should be reversed because it effectively overrules a line of cases holding that the FCC may follow a "hard look" policy of strictly enforcing its rules and impose a "sanction as drastic as dismissal" for noncompliance without further consideration *only* when it gives clear and unambiguous notice of the requirements that must be met to avoid dismissal. *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968); *see Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987). In *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993), the Court extended this doctrine, holding that the FCC must articulate its requirements with sufficient clarity "that, based on a 'fair reading' of its order, the petitioners knew or should have known what the Commission expected of them." 990 F.2d at 1358.

The panel's decision in the instant case, on the other hand, holds that the Commission is not required to say which rules are subject to this strict enforcement policy:

> The Commission need not supply a separate "shopping list" specifying that each separate rule violation may lead to dismissal. It is enough that the FCC rules are clearly spelled

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[9] The rule, as written, is not directed at corporations but to their shareholders; neither the rule nor the decision adopting it indicate that corporations would be held strictly liable for violations caused by the independent actions of their non-controlling passive shareholders.

> out and applicants are on notice that their applications are subject to dismissal for failure to comply with these rules.

Slip op. at 14. In the course of reaching this conclusion, the panel cited numerous examples of decisions affirming the FCC's application of its "hard look" policies.[10]

The decisions it cites, however, do not support its sweeping conclusion. Contrary to the panel's assertion that the FCC need not issue a "laundry list" of rules subject to a "hard look" policy, the very cases cited by the panel were premised on the publication of a list of the specific requirements that must be met to avoid dismissal of an application as unacceptable for filing.[11] The *Salzer* case disposes of the panel's assertion that the FCC need not specify which requirements are subject to a "hard look" policy and may simply dismiss applications for any and all rule violations. In that case, the Court sustained the dismissal of one application, which failed to contain information on the FCC's list of essential prerequisites, but it also *vacated the dismissal of another application for a deficiency regarding an item not listed as being subject to the "hard look" dismissal policy.* 778 F.2d at 875. The Court held, "the *quid pro quo* for stringent acceptability criteria is explicit notice of all acceptability requirements . . . . The less forgiving the FCC's acceptability standard, the more precise its requirements must be." *Id.*

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[10] Slip op. at 12-14, *citing JEM Broadcasting Co. v. FCC*, 22 F.3d 320 (D.C. Cir. 1994) (dismissal for inconsistent site information); *Glaser v. FCC*, 20 F.3d 1184 (D.C. Cir. 1994); *Russian River Vintage Broadcasting v. FCC*, 5 F.3d 1518 (D.C. Cir. 1993) (dismissal of application for failure to provide verifiable site information); *Moving Phones Partnership, L.P. v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994) (dismissal of application violating alien ownership limits); *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (dismissal of application for failure to comply with height limits).

[11] In *JEM Broadcasting*, *Russian River*, and *Glaser*, the Court relied on the fact that the FCC had issued a detailed list of the specific "indispensable components of a 'substantially complete' license application," 22 F.3d at 322-23, and the items found defective were on that list. *Id.*; *Glaser*, 20 F.3d at 1186; *Russian River*, 5 F.3d at 1520; *Malkan*, 935 F.2d at 1319. In *Moving Phones*, the court held both the Communications Act and its rules gave specific notice that compliance with alien ownership limits was an essential licensee qualification, lack of which could not be cured by amendment. 998 F.2d at 1057.

In the instant case, the FCC did not state, upon adopting the rule at issue, that it was one on which acceptability for filing would be premised. It did not so state in any decision issued before Appellant's application was filed. It certainly is not obvious from the rule, which is not phrased in terms of application content or acceptability, but simply sets forth an ownership policy, similar to the broadcast rules regarding ownership. The rule is not even directed specifically toward applicants; it is a directive to persons who are parties to applications, informing them that they are not to hold interests in competing applications.[12] A fair reading of the rule would be that shareholders having interests in competing applicants would be required to divest, consistent with the Commission's practice regarding its broadcast ownership rules. The first announcement by the FCC that the rule is one requiring strict compliance *came at the time it dismissed Appellant's application*. The case law of this Circuit unanimously supports vacation of this action.[13]

III. THE FCC CANNOT LAWFULLY REFUSE TO CONSIDER A WAIVER REQUEST ON THE MERITS ON THE GROUNDS THAT DOING SO WOULD CAUSE A DELAY IN LICENSING

The panel's decision conflicts with well-established law in this Circuit holding that rule waivers are an essential part of the FCC's regulatory scheme -- the "safety valve" permitting deviation from a rule when strict compliance would be inconsistent with the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). In *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166-67 (D.C. Cir. 1990), the Court held that the FCC must explain whether

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[12] Thus, the FCC gave no notice that it intended to apply the rule so as to hold corporate applicants vicariously liable for ownership violations of their shareholders. *See* Section I, *supra*.

[13] In addition, the FCC appears, on reconsideration, to have interpreted the rule as imposing an obligation on a corporate applicant to diligently track its stockholders' investments in other cellular applicants. (A. 6, 8.) It is unclear, however, whether the FCC views this as an affirmative requirement of the rule, violation of which must be punished by dismissal, or simply as a factor it considered in connection with the waiver request. In any event, this requirement is not expressed by the rule and is not contained in any prior decision. It cannot, therefore, be relied upon as a basis for the dismissal.

waiving the rule better serves the public interest than following it and must also articulate the standards it follows in evaluating a waiver request. These cases are consistent with the Supreme Court's holding in *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962), that there must be a "rational connection between the facts found and the choice made."

The panel's decision effectively grants the FCC unfettered discretion to refuse to consider waivers entirely. The panel states (slip op. at 17):

> The Commission found that granting waivers for inadvertent violations would hinder the administrative process and would slow the provision of service to the public. Given the fact that the cellular licensing process was streamlined to prevent the administrative delays that ultimately resulted in service delays, we cannot say that the Commission's reasons for denying the waiver in this case were "so insubstantial as to render that denial an abuse of process."

In other words, the FCC has *carte blanche* to refuse waivers based on administrative convenience, if it finds that devoting attention to waivers will delay the granting of applications. This holding is factually unsupportable in the present case, because the FCC's finding that service would be delayed by considering the waiver is contrary to the facts.[14]

The holding is also unsupportable as a matter of law, because it conflicts with the holding of *WAIT Radio* that the Commission must consider whether the public interest would be better served by waiving the rule. By relying solely on administrative convenience to deny waivers, the Commission shuts off the "safety valve" that is essential to decisionmaking under the public interest standard.

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[14] If Appellant's waiver request had been granted, its application could have been granted in January 1991. Because the waiver was denied, the FCC had to hold another lottery, after which the new tentative selectee was disqualified for violation of the same application cross-ownership rule that caused Appellant's dismissal. *Clifford Stanton Heinz Trust d/b/a CSH Cellular*, 8 FCC Rcd. 973 (Mob. Ser. Div. 1993), *pet. for recon. pending*. No license has yet been issued as a result. Denial of the waiver has caused three and one-half years of delay in licensing so far, which could have been avoided by granting the waiver.

Moreover, the FCC decision affirmed by the panel violates the requirement of *Northeast* that the Commission follow articulated standards in evaluating waiver requests. "No waivers because of delay" is not a rational decisional standard; it represents the abandonment of all decisional standards.

In the instant case there was no rational connection between the facts and the basis for the decision. The FCC's decision was based on the need to avoid the delays in licensing that waivers would entail, yet the choice made by the FCC actually resulted in delay. No license has been issued since the FCC's initial denial of a waiver in early 1991, but granting a waiver would have permitted issuance of a license at that time. The FCC did not consider whether the public interest would better be served by waiver or enforcement of the rule, and it did not articulate rational standards by which it judges requests for waiver of the rule at issue. The FCC's "no waiver because of delay" policy simply does not square with the case law of this Circuit or the *Burlington* case.

CONCLUSION

For the foregoing reasons, Florida Cellular Mobile Communications Corporation requests that rehearing be granted and suggests that rehearing *in banc* is warranted.

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August 29, 1994

[certificate of service omitted]

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. CONST., AMEND. V, provides, in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

Section 309 of the Communications Act, 47 U.S.C. § 309 (1992), provides, in relevant part:

> § 309. Application for license.
>
> (a) Considerations in granting application
>
> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application; and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> * * *
>
> (i) Random selection
>
> (1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.
>
> * * * * *

47 C.F.R. § 22.921 (1988) provides, in relevant part:

§ 22.921 Ownership in applications for cellular service for markets below the top-90.

* * *

(b) *Markets beyond the top-120 and Rural Service Areas*—(1) *General.* Except as otherwise provided herein, no party may have an ownership interest, direct or indirect, in more than one application for the same MSA or NECMA market, except that interests of less than one percent will not be considered. For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

(2) *Ownership interests in publicly-traded corporate applicants.* Notwithstanding paragraph (b)(1) of this section, no party may have an ownership interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations for an MSA market, a non-MSA/non-NECMA area, or a Rural Service Area, except that interests of less than five percent will not be considered.

(c) *Application.* In applying the provisions of paragraph (b), ownership and other interests in cellular applicants will be attributed to their holder and deemed cognizable as set forth below.

(1) *Passive investors.* Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies, and banks holding stock through their trust departments in trust accounts will be deemed to have a cognizable interest in a publicly-traded cellular applicant only if they hold 10 percent or more of the stock of the applicant. This provision applies only if an applicant in which such parties hold an interest certifies in its application that no such party has exerted or attempted to exert any influence or control over the officers of the applicant.

* * * * *

47 C.F.R. § 22.922 (1988) provides:

> § 22.922 Transfers and assignments of applications, permits or licenses in Rural Service Areas.
>
> (a) Notwithstanding any other section of this Part, the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

(2)

No. 94-1128

RECD
FEB 27 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WENDY C. COLEMAN D/B/A/ WCC CELLULAR,
JAJ CELLULAR PARTNERSHIP,

Respondents.

On Petiton for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT' S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming an order of the Federal Communications Commission dismissing Petitioner's cellular license application for violating the Commission's multiple ownership rule where: (1) the rule clearly prohibited anyone from holding any ownership interest in competing non-wireline cellular license applications; (2) Petitioner knew and understood the rule; and (3) one of Petitioner's shareholders nevertheless held dual ownership interests in competing applications.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, WENDY C. COLEMAN D/B/A/ WCC CELLULAR, JAJ CELLULAR PARTNERSHIP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Wendy C. Coleman d/b/a WCC Cellular respectfully requests that the Court deny the Petition for a Writ of Certiorari.

CONSTITUTION, STATUTES, AND REGULATIONS

Relevant statutes and regulations are set forth in Petitioner's Petition for Certiorari, with the exception of 47 C.F.R. § 22.20, which provides, in pertinent part, as follows:

* * * * *

Defective Applications.

(a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:

* * * * *

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information, or other requirements.

* * * * *

STATEMENT OF THE CASE

Respondent, Wendy C. Coleman, d/b/a WCC Cellular ("WCC") agrees with the Statement of the Case set forth in the Response filed by Respondent Federal Communications

Commission ("FCC").[1] Respondent provides the following additional statement concerning a significant issue raised below but not addressed by Petitioner.

The Commission's "multiple interest" rule provides that no person may own an interest in more than one application for a non-wireline cellular license in Rural Service Area (RSA) markets.[2] At the time Florida Cellular filed its application for the non-wireline cellular license in Maryland 2 (Kent) RSA No. 468 ("MD-2"), one of its shareholders held an interest in another applicant for the same MD-2 RSA non-wireline cellular license.[3] Because that shareholder's dual interest in competing applicants violated the multiple interest rule, the Commission dismissed Florida Cellular's application.[4]

Although it was twice rebuffed by the Commission on reconsideration, and turned down by the court of appeals, the fundamental element of Petitioner's argument has been, and continues to be, its alleged misunderstanding of the scope

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[1]WCC also respectfully directs the Court's attention to the thorough and succinct Statement of the Case set forth in the opinion below. Florida Cellular Mobil Communications Corporation ("Florida Cellular") Petition for Certiorari, Appendix ("Pet. Appx.") at 5a - 7a.

[2]47 C.F.R. § 22.921(b) provides in pertinent part that "[f]or Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same rural service area, including an interest of less than one percent."

[3]Pet. Appx. at 6a. The shareholder, Yerger Yandell, held a five percent interest in Kudzu Cellular Partnership ("Kudzu"). *Id.*

[4]Pet. Appx. at 7a.

and application of the Commission's cellular multiple interest rule. Specifically, Petitioner has argued that, despite the express terms of the rule, it did not understand that the rule prohibited multiple interests held by minority shareholders in competing corporate applicants. Indeed, Florida Cellular argued below that it had no notice or understanding that the rule would prohibit Yandell's dual interest in Florida Cellular's and Kudzu's applications.[5] Florida Cellular's professed ignorance or misunderstanding of the rule was, however, a misrepresentation.

On March 7, 1994, WCC sought leave to supplement the appendix in the Court of Appeals with a copy of a letter written by counsel for Florida Cellular on August 21, 1992.[6] In that letter, Petitioner's counsel recounted not only the details of the multiple interests held by shareholders of Petitioner, but rendered an analysis that demonstrated a complete understanding of the Commission's multiple interest rule as applied to minority shareholders:

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[5]Florida Cellular Reply Brief at 6, 16, *Florida Cellular Mobil Commun. Corp. v. F.C.C.* (D.C. Cir., filed Feb. 25, 1994) (Docket No. 92-1664).

[6]Florida Cellular vehemently opposed Respondent WCC's efforts to supplement the appendix, moving to strike the supplement and suggesting that WCC be sanctioned. Motion to Strike 'Motion to Supplement Appendix' and 'Supplemental Appendix' and Contingent Request for Opportunity to File Supplemental Brief, *Florida Cellular Mobil Commun. Corp. v. F.C.C.* (D.C. Cir., filed Mar. 11, 1994) (Docket No. 92-1664). Without waiting for WCC's response, the court denied Florida Cellular's motion in its entirety and supplemented the appendix with the letter as requested. Order, *Florida Cellular Mobil Commun. Corp. v. F.C.C.* (D.C. Cir., Mar. 16, 1994) (Docket No. 92-1664). A copy of the Letter is attached hereto as Respondent WCC's Appendix ("WCC Appx.").

In May 1988 the FCC released several orders in the rural cellular rulemaking docket, finalizing the rules governing RSA applications, and established the initial RSA filing dates, which were to begin July 13, 1988. Among the rules adopted in May 1988 was a rule prohibiting *any* cross-ownership among competing applicants. Counsel advised the companies that ownership changes would be needed to comply with the new rules against cross-ownership below the former 1% threshold.

Based on this advice, in June 1988, there were various changes in the ownership of the two companies, as the result of which any common ownership between the companies was eliminated a month before the RSA cellular filings were scheduled to begin.

* * * * *

Under the rules applying to MSA cellular filings, interests in multiple applications *by shareholders* owning less than 1% were permitted. *The ownership changes took place in direct response to the FCC's May [1988] promulgation of a rule prohibiting such*

common ownership for the RSA applications that were to be filed starting in July 1988.[7]

Florida Cellular's explanation was consistent with the interpretation advanced by the Commission when it adopted the rules in 1988. The Commission explicitly amended its rules "to prohibit non-wireline RSA applicants from having *any* ownership interests, including those of less than one percent, in more than one application in the market."[8] Through this supplement to the appendix in the court of appeals, WCC demonstrated that the Florida Cellular understood the meaning and application of the Commission's multiple interest rule. Thus, Petitioner's failure to eliminate the multiple ownership interests of one of its shareholders in the MD-2 market compelled dismissal of its application pursuant to 47 C.F.R. § 22.20(a)(2). Florida Cellular's documented understanding belies its assertion that the Commission's rule was ambiguous or the dismissal was anything but proper and consistent with due process.

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[7]WCC Appx. at pp. 5a, 8a (Initial emphasis in original; subsequent emphasis supplied). Attached to this letter were exhibits listing Petitioner's shareholders and the adjustments in ownership made to comply with Section 22.921(b)(1).

[8]Amendment of the Commission's Rules for Rural Cellular Service, *Third Report and Order,* 4 FCC Rcd. 2440, 2443 (1988) (emphasis in original) (hereinafter "*Third Report and Order*").

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT IMPORTANT OR NOVEL QUESTIONS OF LAW.

Contrary to Petitioner's assertions, this case does not involve the imposition of "strict vicarious liability" on a wholly innocent corporation nor does it implicate Petitioner's right to due process. The cellular multiple interest rule does not hold anyone "liable" for "wrongful acts" of another; rather, the rule simply establishes certain qualifications for cellular applicants which must be met before an application can be accepted or a cellular license awarded.

Even indulging Petitioner's argument that the rule somehow imposes liability on cellular license applicants, the court below correctly found that Petitioner's due process rights were not violated. Petitioner knew and understood the rule and Petitioner did not eliminate its multiple ownership interests before filing its application. Moreover, the Commission's strict enforcement of the rule is rationally related to the rule's dual purpose - elimination of speculation in the non-wireline cellular application process and expediency in awarding cellular licenses.

A. The FCC's Cellular Cross Ownership Rule Does Not Impose Strict Vicarious Liability On Cellular Applicants.

Vicarious liability, rooted in tort law, is the imposition of liability upon one party for a wrong committed by another party because of some relationship between the two.[9] Petitioner's argument is fundamentally flawed because Section 22.921(b)(1) does not impose liability on cellular applicants for another party's wrongdoing. Rather, the cellular multiple interest rule conditions receipt of a benefit on the fulfillment of certain clearly defined conditions.

A license is a privilege granted by the government. This Court has specifically stated that an administrative agency may promulgate rules that have the effect of denying licenses to applicants who do not meet clearly defined conditions.[10] The cellular multiple interest rule limits qualified applicants to those parties that do not have ownership interests in more than one cellular application in one RSA. If any individual has an interest in more than one application, then those applications are defective and cannot

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[9]*See* William L. Prosser, *Law of Torts* § 69 (4th ed. 1983).

[10]*United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding FCC rules denying broadcast licenses to applicants with direct or indirect interest in other stations beyond a limited number); *see also F.C.C. v. National Citizens Comm. for Broadcasting et al.*, 436 U.S. 775, 791 (1978). There is no question that the Government may impose reasonable restrictions on licensees. *Conley Elecs. Corp. v. F.C.C.*, 394 F.2d 620, 625 (10th Cir. 1968), *cert. denied*, 393 U.S. 858 (1968) (quoting *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892 (2d Cir. 1960)), ("privileges are held subject to limitations that may reasonably be imposed upon them in the public interest").

be accepted or granted. The fact that a corporate applicant's application is unacceptable or defective does not amount to some sort of "liability" for someone else's wrongdoing. It only means that the applicant did not fulfill the conditions necessary to participate in the cellular licensing process.[11] Accordingly, the fact that the multiple interest rule applies equally to individual and corporate applicants does not render any subsequent dismissal "vicarious" in nature. Florida Cellular never met the qualifications necessary for its application to be accepted, and thus the Commission properly dismissed its application.

B. The Court Of Appeals Correctly Found That The Commission's Order Dismissing Petitioner's Application Did Not Violate Petitioner's Due Process Rights.

Even indulging Petitioner's theory of "strict vicarious liability" for the moment, Petitioner's argument that application of the Commission's multiple interest rule violates Petitioner's due process rights must fail. First, the lower court correctly affirmed the Commission's finding that Petitioner's lack of due diligence was partly to blame for the failure to comply. Second, the Commission's strict enforcement of the multiple interest rule did not deprive Petitioner of procedural due process. Finally, the Commission's multiple interest rule complies with due process because it is rationally related to the rule's dual purpose: elimination of speculation in the non-wireline

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[11]By the very nature of the business, shareholders of the applicant -- and not the applicant itself -- are the ones who would hold multiple interests and thus violate the rule. Accordingly, any interpretation of the rule that would prohibit dismissal where there are multiple interests held by shareholders would result in essentially no rule at all.

cellular application process and expedient cellular licensing in the public interest.

1. Petitioner did not exercise due diligence to eliminate its multiple ownership interests in competing cellular applicants.

Affording substantial and proper deference to the Commission's findings,[12] the court below agreed with the Commission that Petitioner's lack of due diligence was partly to blame for its failure to qualify for a license.[13] The court specifically held that the Commission may, without violating due process, dismiss an application that does not comply with Commission rules when the applicant's lack of due diligence is at least partly to blame for the failure to comply.[14] As noted by the court, its holding is consistent with its prior decisions affirming the Commission's authority to disallow

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[12] *Udall v. Tallman*, 380 U.S. 1, 16-17 (1985).

[13] Pet. Appx. at 16a - 17a. The court found that Petitioner failed to notify at least one of its shareholders, Yerger Yandell, of its intent to file a non-wireline cellular application for the MD-2 RSA or of the prohibition on owning multiple interests in competing applications. Pet. Appx. 6a. Although Mr. Yandell had moved his personal residence three blocks, Petitioner was alerted to Yandell's move when one of his shareholder notices was returned to Petitioner marked "Unable to deliver - no forwarding address." Pet. Appx. 5a -6a. Moreover, Yandell remained listed in the telephone directory, and after Petitioner's selection in the lottery, Petitioner updated its shareholder mailing list and obtained Yandell's new address. Pet. Appx. at 6a. As a direct result of Petitioner's inadequate efforts to locate Yandell, at the time Petitioner filed its application, Mr. Yandell held a .85% interest in Petitioner and a 5% interest in Kudzu, a competing applicant. *Id.*

[14] Pet. Appx. at 17a.

amendments to applications where the applicant failed to satisfy due diligence requirements.[15]

Contrary to Petitioner's suggestion, the court of appeal's decision is entirely consistent with the relevant precedent concerning strict vicarious liability, including that cited by Petitioner. The cases cited by Petitioner do not, as Petitioner suggests, "embrace the principle that when a regulated party is innocent of wrongdoing and 'powerless to prevent' a violation by others, no punishment or liability can constitutionally be imposed." Petition For Certiorari ("Pet. Cert.") at 8. In fact, all of the cases cited by Petitioner stand for the proposition that "put[ting] the burden of acting at hazard upon a person *otherwise innocent* but standing in a responsible relation to a public danger" is *not* unfair and does *not* violate due process even where the punishment is criminal in nature.[16] Thus, Petitioner's attempts to sway this court with allegations of its innocence are legally irrelevant and insupportable.

What is relevant to a due process analysis of vicarious liability is Petitioner's failure to do all that it could have done to prevent the multiple interest violation. As this Court stated in *United States v. Park*, "corporate agents vested with the responsibility, and power commensurate with that

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[15] *Id.* (citing *Pontchartrain Broadcasting Co. v. F.C.C.*, 15 F.3d 183, 184 (D.C. Cir. 1994); *Marin TV Servs. Partners, Ltd. v. F.C.C.*, 936 F.2d 1304, 1306 (D.C. Cir. 1991); *Royce Int'l Broadcasting Co. v. F.C.C.*, 820 F.2d 1332, 1336 (D.C. Cir. 1987)).

[16] *United States v. Park*, 421 U.S. 658, 668 (1975) (emphasis added) (citation omitted); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974) (finding that party had not shown that it did all that it reasonably could have to avoid the illegal act).

responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations."[17] As explained above, the Commission found and the court of appeals affirmed, that Petitioner did not do all that it could to prevent a violation of the multiple interest rule.[18] Accordingly, its application was properly dismissed.

Thus, notwithstanding Petitioner's vain attempts to persuade this court that its case is novel or important, in fact, the Commission's application of its multiple interest rule is consistent with established precedent concerning strict vicarious liability. *See infra*, Part C.

2. The Commission's strict application of its multiple interest rule did not violate Petitioner's procedural due process rights.

The due process clause of the Fifth Amendment does not preclude the Commission from promulgating licensing standards through the rule making process and enforcing them generally without engaging in case by case

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[17]421 U.S. at 672.

[18]"The extension of the doctrine of liability without fault to new situations to attain a permissible legislative object is not so novel in the law or so shocking 'to reason or to conscience' as to afford in itself any ground for the contention that it denies due process of law." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 115 (1927). After all, the literal translation of *respondeat superior* is simply, "look to the man higher up." Prosser at 459.

adjudication.[19] In this case, the Commission adopted a clear and unambiguous rule prohibiting applicants from owning multiple interests, including those of less than 1%, in non-wireline applications for the same RSAs. Section 22.20(a)(2) of the Commission's rules unambiguously states that defective applications will be dismissed. Indeed, the certification that all cellular applicants are required to give specifically states that applications that do not comply with the Commission's cellular application rules "shall be dismissed without further consideration." Pet. Appx. at 10a.

Petitioner suggests that due process requires the Commission to conduct a fact specific inquiry into the intent of an applicant before dismissing an application. However, as a tentative selectee in the cellular application process, Petitioner's entitlement to procedural safeguards was extremely limited.[20] Long ago this Court established that

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[19]*Conley Elecs. Corp.*, 394 F.2d at 625; *Airline Pilots Ass'n*, 276 F.2d at 896 (*citing Storer Broadcasting*, 351 U.S. at 205).

[20]*See Cellular Lottery Order*, 98 F.C.C.2d 175 (1984) (selectee is not issued license unless and until staff reviews application and verifies selectee is qualified). The Commission reviews cellular license applications at three stages. The initial stage constitutes the "letter perfect" review; the second stage is the "acceptable for filing" review; and the final stage is the "public interest" review. *Singleton v. F.C.C.*, 952 F.2d 1444, 1446 (D.C. Cir. 1992). Although many applications may pass the "letter perfect" standard for crossing the threshold at the Commission's filing desk, the second review under the "acceptable for filing" standard, set forth in 47 C.F.R. § 22.20(a), is more rigorous. Indeed, although certain applications may pass the "letter perfect" stage, review of applications for filing continues even after lottery selection and designation of an applicant as a tentative selectee. *REM Communication*, 3 FCC Rcd. 3705 (1988). Accordingly, even after an applicant is designated as a tentative selectee for a license, its application is still subject to review and dismissal for noncompliance with the Commission's rules.

based on the language and purpose of the Communications Act, "no person is to have anything in the nature of a property right as a result of the granting of a license."[21] Accordingly, in the particular instances presented here, Petitioner's claim to a property interest and a pre-termination hearing is insupportable.[22]

Moreover, due process of law does not require a hearing "in every conceivable case of government impairment of private interest."[23] In an administrative setting, where "government official[s] [are] given the power to make discretionary decisions under a broad statutory standard, case-by-case decisionmaking may not be the best way to assure fairness."[24] Often, the decision to use objective rules provides more precise notice of what conduct is required.[25]

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[21]*Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 n. 6 (1945) (quoting *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)); 47 U.S.C. § 301.

[22]To have a property interest in a benefit protected by due process, a person must have more than a unilateral expectation of it. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Petitioner's multiple ownership interests in competing applications for the MD-2 RSA disqualified its application from participation in the lottery. Thus, even though Petitioner was designated the "tentative selectee" for the license, Petitioner never held a property interest in the license because its application was at all times deficient. *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926) (to have protectable property interest at application stage must be "within the class of those entitled . . . under the . . . rules.")

[23]*Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894 (1961).

[24]*Dixon v. Love*, 431 U.S. 105, 115 (1977).

[25]*Id.; see also Storer Broadcasting Co.*, 351 U.S. at 202-206.

Accordingly, where, as here, rules of general application are promulgated in a valid rule making proceeding, those rules may be generally applied without individual adjudicatory hearings.

Finally, the Commission afforded all cellular applicants, including Petitioner, adequate notice of the rule's requirements and the consequences of noncompliance. Petitioner claims that the Commission did not clearly define the scope of the rule because it did not define "party to a non-wireline application."[26] In fact, the scope of the rule was clear from the text of the rule and the order adopting the rule,[27] as evidenced by Petitioner's own understanding of the rule prior to filing its application.[28] Moreover, contrary to Petitioner's suggestions, all applicants were clearly notified that non-conforming applications were subject to dismissal. Section 22.20(a)(2) states that applications not in compliance with Commission rules will be dismissed. Further, all applicants, including Petitioner, were required to sign a certification that explained that non-conforming applications

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[26]Pet. Cert. at 19. In challenging this phrase on notice grounds, Petitioner has slyly avoided the court of appeals rejection of a similar argument. In the court of appeals, Petitioner argued for the first time that Mr. Yandell was not a "party to the application," and therefore not subject to the multiple interest rules. Although Mr. Yandell was a "party," even under Florida Cellular's theory, the court did not consider Petitioner's argument because Petitioner failed to raise it before the Commission. Pet. Appx. at 17a.

[27]In its order adopting the rule, the Commission clearly explained that it intended "to prohibit non-wireline RSA applicants from having *any* ownership interest, including those of less than 1%, in more than one application in a market." *Third Report and Order*, 4 FCC Rcd. 2440, 2443 (1988) (emphasis added).

[28]*See supra* , pp. 4-6.

would be dismissed.[29] Finally, the Commission's consistent and strict enforcement of its qualification and multiple interest rules further notified all applicants that non-conforming applications would be subject to dismissal.[30]

3. The Commission's strict enforcement of its multiple interest rule is rationally related to the rule's purpose.

Even if Petitioner held a protectable property interest in the license, the Commission need only demonstrate that its strict enforcement of its licensing qualifications is reasonably related to permissible public-interest goals.[31] This standard is akin to the standard applied by courts to economic regulations.[32] And, as demonstrated by the case law cited by Petitioner, this Court has consistently upheld economic

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[29]Pet. Appx. at 10a.

[30]*See, e.g. Memorandum Opinion And Order On Further Reconsideration*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985) ("[T]he tentative selectee's application will be carefully reviewed to ensure its compliance with the cellular application standards and *will be dismissed* for failure to [do] so."); *Petitions for Reconsideration of the Return of Round IV Cellular Applications for Miscellaneous Defects*, 103 F.C.C.2d 414, 419 (1986) ("*Round IV Cellular Applications*") (dismissing three applications for failure to comply with multiple ownership prohibition).

[31]*F.C.C. v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 794 (1978).

[32]Petitioner's claim that courts construing equal protection challenges apply "essentially the same" rational relationship analysis as courts examining economic regulations is transparent. Obviously Petitioner would like to rely on equal protection cases in which the Court has struck down certain regulations. However, there is no reason for the Court to rely on equal protection precedent when more relevant precedent concerning due process challenges to economic regulations is abundant.

regulations as long as they are "neither arbitrary nor discriminatory."[33] In fact, there is a traditional presumption of constitutionality accorded to economic regulations.[34]

The Commission's cellular multiple interest rule was developed to deter speculation in the licensing process and to avoid delays in granting authorizations.[35] The rule's dual purpose clearly satisfies the public interest standard.[36] The Commission's decision to prohibit any multiple interests in competing applicants for non-wireline RSAs stemmed from its experience processing applications for metropolitan cellular markets. In those markets, the FCC found that the filing of applications by speculators consumed staff time and resources and ultimately delayed service to the public.[37] The Commission thus prohibited wireline applicants from holding multiple ownership interests in the same RSA, including those of less than 1%, to deter speculation and thereby,

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[33]*See, e.g., Nebbia v. New York*, 291 U.S. 502 (1934) (upholding price fixing regulations); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law).

[34]*Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978).

[35]*Third Report and Order*, 4 FCC Rcd. at 2440.

[36]*See Storer Broadcasting Co.*, 351 U.S. at 205 ("We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing"); *National Citizens Comm. for Broadcasting*, 436 U.S. at 794 (finding diversification to be legitimate goal underlying licensing regulations).

[37]*Third Report and Order*, 4 FCC Rcd. at 2440.

expedite cellular licensing.[38] Only strict enforcement of the rule's requirements will serve the FCC's ultimate goal of expediency in the cellular licensing process.

C. The Court Of Appeal's Decision Affirming The Commission's Strict Enforcement Of Its Regulations Is Consistent With Established Precedent.

The fact that the lower court's decision follows an unbroken line of authority is further support for denying certiorari in this case. Petitioner's effort to elevate this case into one of judicial debate and constitutional importance should be rejected.

The Commission has consistently required strict compliance with its qualification and multiple interest rules. For example, in the *Progressive Cellular* proceeding, the Commission dismissed an application for violation of the multiple interest rule, notwithstanding an argument that the violation was unintentional.[39] Similarly, in the *Round IV Cellular* proceeding, the Commission rejected various excuses for violating the MSA multiple interest rule and found that an applicant "clearly and unambiguously" violated an explicit rule section, rejected claims that there was "reasonable confusion" as to application requirements, and dismissed three applications for violating the multiple interest rule.[40]

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[38]Petitioner's allegation that the purpose underlying the rule was solely to deter speculation is thus incomplete. *See* Pet. for Cert. at 14.

[39]*Progressive Cellular III B-3*, 6 FCC Rcd. 596, *recon. denied*, 6 FCC Rcd. 7178 (1991), *aff'd mem.*, 986 F.2d 546 (D.C. Cir.), *cert. denied*, 114 S.Ct. 174 (1993).

[40]*Round IV Cellular Applications*, 103 F.C.C.2d at 414, 418-20.

The Commission has also been consistently strict in its interpretation of other qualification rules. For example, in one group of cases, the Commission found that a number of applicants had violated the restrictions against alien ownership of cellular licenses and dismissed *all* of the affected applications.[41] In another case, the Commission found that even the failure to include a legible map of the service area disqualified an applicant and justified dismissal of the application.[42] In all of these decisions, the Commission strictly adhered to the literal meaning of the rules and offered no exemption for unintentional or inadvertent violations.

Moreover, the court of appeals has uniformly upheld the Commission's strict interpretations of its rules,[43] as well as the Commission's authority to dismiss non-conforming

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[41] *Application of Cells Co., et al.*, 7 FCC Rcd. 2143, *aff'd sub nom., Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051 (D.C. Cir. 1993), *cert. denied* 114 S. Ct. 1369 (1994). In the *Moving Phones* decision, this Court rejected all applications in which alien partners had an interest and rejected efforts by the applicants to amend their applications to reflect that these alien partners could not "control" the partnership by way of restrictive agreements. *Moving Phones*, 998 F.2d at 1057. There, as here, the rules prohibited certain interests in applications and where the notice was clear, no exemption was available for even those violations that did not undermine the professed purpose of the alien ownership rule.

[42] *REM Communication*, 3 FCC Rcd. at 3705.

[43] *Florida Inst. of Technology v. F.C.C.*, 952 F.2d 549, 550 (D.C.Cir. 1992); *City of Angels Broadcasting, Inc. v. F.C.C.*, 745 F.2d 656, 663 (D.C. Cir. 1984).

applications.[44] And, this Court specifically upheld the Commission's authority to deny an application without further inquiry if a license applicant does not qualify under standards set forth in regulations, and does not proffer sufficient grounds for waiver or change of those standards.[45] Notwithstanding the numerous cases cited in its petition for certiorari, none of Petitioner's cases contradicts the decision of the court below. The fact that the decision below conforms with existing precedent further exemplifies why there is no need for additional review in this Court.

D. The Commission's Enforcement Of Its Cellular Cross-Ownership Rule Is Consistent With Its Authority Under The Communications Act.

Petitioner has raised two statutory arguments in its Petition that were not raised before the court of appeals or the Commission. For the first time, Petitioner argues that the Commission, in dismissing Petitioner's application, exceeded its authority under the Act and failed to comply with the Act's notice requirements. Pet. Cert. at 10 - 13. Generally the Court "does not decide questions not raised or resolved in the lower court."[46] Where, as here, the Commission has

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[44]*See, e.g. JEM Broadcasting Co., Inc. v. F.C.C.*, 22 F.3d 320, 329 (D.C. Cir. 1994); *Pontchartrain Broadcasting Co.*, 15 F.3d at 184; *Russian River Vintage Broadcasting v. F.C.C.*, 5 F.3d 1518, 1521 (D.C. Cir. 1993); *Royce Int'l Broadcasting Co. v. F.C.C.*, 820 F.2d at 1336.

[45]*National Citizens Comm. for Broadcasting*, 436 U.S. at 781.

[46]*Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Air Lines, Inc. v. August*, 450

not had the opportunity to consider the arguments, there is even greater reason for the court to ignore them.[47] Accordingly, these arguments should not be considered by this Court.

In any event, Petitioner's statutory arguments are entirely without merit. The Commission is granted broad authority under the Communications Act to promulgate rules in furtherance of the public interest.[48] Pursuant to that authority, the Commission may promulgate rules that contain licensing limitations, including limitations based on ownership interests and efficient administration.[49] In addition, Congress gave the Commission wide latitude to establish rules governing the selection of qualified applicants through the use of lotteries.[50] The Commission's rule limiting participation in the cellular license lottery to applicants not holding multiple ownership interests in competing applicants is precisely the type of licensing restriction within the Commission's power to promulgate. It is not, as Petitioner

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U.S. 346, 362 (1981) (finding that question presented in petition but not in court of appeals was not properly raised).

[47]*Northwestern Ind. Tel. Co., Inc. v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("'courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice'") (quoting *Washington Ass'n for Television & Children v. F.C.C.*, 712 F.2d 677, 680-82 (D.C. Cir. 1983)); *Russian River Vintage Broadcasting*, 5 F.3d at 1521.

[48]47 U.S.C. § 154(i); *National Citizens Comm. for Broadcasting*, 436 U.S. at 794.

[49]*Storer Broadcasting*, 351 U.S. at 203.

[50]Conference Report on Communication Amendments Act of 1982, Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 39 (1982).

asserts, an imposition of strict vicarious liability. *See supra*, Part I. Thus, the FCC acted within its statutory authority by enforcing a rule with which, plain and simply, Petitioner did not comply.

Petitioner's argument that the Commission failed to provide adequate notice of the scope and effect of its multiple interest rule must also fail. As demonstrated above, the notice provided by the Commission was entirely adequate for purposes of due process as well as the Communications Act. The fact that Petitioner knew and understood the rule's limitations further demonstrates the unambiguous character of the rule.

Finally, Petitioner was required to certify that it understood that non-compliance would lead to dismissal.[51] "It is enough that the FCC rules are clearly spelled out and applicants are on notice that their applications are subject to dismissal for failure to comply with these rules."[52] Nothing in any of Petitioner's claims merits review by this Court.

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[51]Pet. Appx. at 10a.

[52]Pet. Appx. at 13a.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully Submitted,

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August 21, 1992

Honorable Alfred C. Sikes, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Florida Cellular Mobil Communications Corporation
File No. 10854-CL-P-468-A-89

Dear Mr. Chairman:

This is in response to an unauthorized pleading in letter form addressed to you on August 18, 1992 by counsel to Wendy C. Coleman d/b/a WCC Cellular ("WCC") concerning a petition for reconsideration filed by my client,

Florida Cellular Mobil Communications Corporation ("Florida Cellular"). WCC is not a party to the reconsideration proceedings now before the Commission and has not voiced any objection to Florida Cellular's application at any time in the past, despite numerous opportunities. On April 8, 1992, the Commission held a new lottery to pick an alternate selectee for the Maryland 2 market, subject to Florida Cellular's disqualification. WCC was selected in this re-lottery, and WCC now stands to benefit by attempting to create uncertainty as to the merits of Florida Cellular's position. The Commission should not allow WCC's unauthorized filing to influence its consideration of the pending petition for reconsideration not only because of its untimely nature but also because WCC's allegations are without merit.

Florida Cellular's pending petition for reconsideration concerns the dismissal of its application for a cellular construction permit for a Rural Service Area known as "Maryland 2", comprising southern Maryland and the Eastern Shore. The dismissal resulted from Florida Cellular's disclosing and seeking to cure an apparent cross-ownership rule violation by an 0.85% shareholder. That shareholder, who was unaware that Florida Cellular was filing for the Maryland 2 market, had, unbeknownst to Florida Cellular, become a 5% partner in another applicant for the Maryland 2 market. When Florida Cellular discovered that the shareholder had unknowingly appeared to transgress the rule

against interests in multiple applications, it disclosed the facts to the FCC and sought a waiver to repurchase his shares and eliminate any rule violation.

WCC's Letter Pleading

In its unauthorized, untimely letter pleading, WCC has suggested that Florida Cellular may have been party to additional cross-ownership rule violations, based on allegations made in a petition to deny filed in a proceeding not involving Florida Cellular. Specifically, WCC submitted a copy of a petition to deny the application of Marco Communications Corp. ("Marco") for the "Oregon 6" market by Silver Wings 1988 L.P., in which it is alleged that certain persons may hold prohibited interests in both Marco and Florida Cellular.

Marco has not yet filed its response to the Silver Wings petition or to another similar petition that was filed against it; Marco's response is due on August 28, 1992. Florida Cellular has supplied extensive information regarding its own ownership to Marco for use in preparing its formal response, which will include extensive documentation demonstrating the lack of any common shareholders among Marco and Florida Cellular. In short, Marco's formal response will amply demonstrate that the facts simply do not bear out the accusations made in the Silver Wings petition.

Florida Cellular had planned to allow the formal Marco response to the petition to speak for itself. However, WCC's unauthorized letter pleading has raised the possibility that the factually incorrect accusations made in the Silver Wings petition may delay or otherwise prejudice the Commission's consideration of Florida Cellular's reconsideration petition. For that reason, Florida Cellular finds it necessary to set the facts straight.

The Facts

Marco was organized in 1983; it was initially founded for the purpose of filing a cellular application for one cellular service area: Naples, Florida. Some Marco shareholders and other investors then organized Florida Cellular, initially to act as a construction agent for the Marco system if it won a license. Not long afterward, Florida Cellular decided to file seven MSA cellular applications. While the seven applications were never filed, both Florida Cellular and Marco later filed a number of MSA cellular applications. Any common ownership between the two companies was below the 1% threshold the FCC permitted in the case of MSA applicants.

In 1987, Florida Cellular and Marco reached a settlement of a dispute with the FCC law firm that had been their application preparer. The settlement called for the preparation of 125 RSA cellular applications for each

company for filing under the rules that were then in the process of being finalized. In May 1988 the FCC released several orders in the rural cellular rulemaking docket, finalizing the rules governing RSA applications, and established the initial RSA filing dates, which were to begin July 13, 1988. Among the rules adopted in May 1988 was a rule prohibiting *any* cross-ownership among competing applicants. Counsel advised the companies that ownership changes would be needed to comply with the new rules against cross-ownership below the former 1% threshold.

Based on this advice, in June of 1988, there were various changes in the ownership of the two companies, as the result of which any common ownership between the companies was eliminated a month before the RSA cellular filings were scheduled to begin. Unfortunately, when their applications were filed with the FCC, obsolete ownership information was included, rather than the corrected ownership data that had been prepared, which would have reflected the pre-filing ownership realignment that occurred because of the FCC's ownership rule revision.

After Florida Cellular's application was selected in the lottery for Maryland 2, the company's corporate counsel supplied its new FCC counsel with a corrected shareholder list for a determination whether the changes needed to be filed with the FCC. Copies of this correspondence, including the corrected shareholder list, are appended as Attachment 1.

Florida Cellular's FCC counsel contacted the Commission staff to determine what information had to be filed concerning Florida Cellular's ownership in an amendment to its application. Based on the staff's advice, and consistent with the provisions of Section 22.13(a)(1)(iii) of the rules, which requires the disclosure of only those shareholders holding 5% or more of a class of stock, an amendment was prepared that included a revised ownership exhibit listing only the two shareholders holding 5% or greater interests. The transmittal letter accompanying the amendment indicated that the original ownership exhibit had been unnecessarily detailed and acknowledged that the listing contained inaccuracies. The transmittal letter stated that Florida Cellular was willing to supply a list of the shareholders holding interests below 5% if needed. A copy of the amendment and transmittal letter is appended as Attachment 2.

On several occasions in the litigation concerning Florida Cellular's application, Florida Cellular has reiterated that its originally-filed ownership exhibit contained errors and inaccuracies. *See* April 24, 1990 Request for Waiver of Section 22.922, at 2 n.3; May 24, 1990 Opposition to Petition to Dismiss or Deny of JAJ Cellular Partnership, at 7-9.

The WCC/Silver Wings Allegations Are Without Merit

The Silver Wings petition and the WCC letter ignored the fact that Florida Cellular has repeatedly stated that the shareholder list in its original application was incorrect. Based on the erroneous ownership stated in the original Florida Cellular application, Silver Wings and WCC assert that Susan Finn, a Marco shareholder, is also the owner of shares in Florida Cellular, jointly with Richard Finn. In fact, Susan Finn has not been an owner of any interest in Florida Cellular since before the RSA applications were filed. The corporate records of Florida Cellular reflect that on June 3, 1988, Richard and Susan Finn requested the company's attorney to transfer their 2500 shares to Richard Finn alone. This was accomplished and a new stock certificate was issued in Richard Finn's name on June 11, 1988; he acknowledged receipt of the new certificate on June 15, 1988. Thus, Susan Finn was never an owner of Florida Cellular at any time during the pendency of the Maryland 2 application, which was filed during the December 14-16, 1988 filing window. Copies of the relevant corporate records are appended as Attachment 3.

Silver Wings and WCC also point to the fact that John Finn, Donald Finn, and Richard Finn were originally listed as shareholders in both Florida Cellular and Marco, based on the ownership lists contained in the two companies' applications. These individuals are in fact shareholders in

Florida Cellular, according to corporate records. They are not now Marco shareholders and have not been at any time since June of 1988 -- before the applications were filed. That fact is reflected in Marco's May 7, 1992 amendment. We have been advised by Marco officials and corporate counsel that the corporate records of Marco reflect the fact that these individuals ceased being shareholders in that company prior to any RSA application filings, and it is our understanding that the Marco response to the Silver Wings petition will provide appropriate documentation.

In sum, the allegations of previously undisclosed cross-ownership between Florida Cellular and Marco are based solely on the erroneous ownership lists included in the two companies' applications and are contrary to the facts. The corporate records of the two companies reflect that during June of 1988 all previously existing commonality of ownership between the two companies was eliminated. There is nothing suspicious about the fact that a number of ownership changes occurred at that time. Under the rules applying to MSA cellular filings, interests in multiple applications by shareholders owning less than 1% were permitted. The ownership changes took place in direct response to the FCC's May 18 promulgation of a rule prohibiting such common ownership for the RSA applications that were to be filed starting in July 1988. The "facts" of which WCC seeks official notice are not facts at all, and they provide no basis for rejecting Florida Cellular's pending

petition for reconsideration.

WCC's Waiver Request Should Be Denied

Finally, we note that WCC has, in a footnote to its letter pleading, sought a waiver of the rules to permit it to file microfiche copies of its filing at a later date. It has given no reason why the rule requiring filings to be made in microfiche form should be waived, and it is difficult to imagine why a waiver would be justified. WCC has not alleged any need for urgency in making its filing, and indeed there is no urgency: its letter is an unauthorized pleading by a non-party made without regard to deadlines and many months after the time for opposing reconsideration expired. Moreover, it was filed ten days before Marco's response to the petition is due to be filed. If WCC waited until Marco's response was filed, there would be no basis for making its filing at all. The timing of the filing suggests that WCC's motivation is less to bring relevant facts to the Commission's attention than to interfere with the Commission's timely consideration of the pending petition for reconsideration. Accordingly, Florida Cellular opposes the request for waiver of the microfiche requirement contained in Section 22.6 of the Rules.

Conclusion

WCC and the Silver Wings petition on which it relies have alleged that there was prohibited common ownership

between Marco and Florida Cellular; these allegations are demonstrably incorrect: Since before their RSA applications were filed, the ownership of Marco and Florida Cellular has been entirely separate. The Commission should not permit WCC's untimely, unauthorized letter pleading to delay or otherwise affect its consideration of Florida Cellular's petition for reconsideration.

Sincerely,

WILKINSON, BARKER, KNAUER & QUINN

By: /s/ Michael Deuel Sullivan

Counsel to Florida Cellular Mobil Communications Corporation

Enclosures

cc: Hon. James H. Quello
Hon. Sherrie P. Marshall
Hon. Andrew C. Barrett
Hon. Ervin S. Duggan
Donna R. Searcy, Secretary (w/microfiche copies)
John Cimko, Chief, Mobile Services Division
Jerome K. Blask, Esquire
James F. Ireland, Esquire
Paul C. Besozzi, Esquire
A. Thomas Carroccio, Esquire

Attachment 1 - Omitted

December 1989 Correspondence Forwarding Corrected Shareholder List for Florida Cellular Mobil Communications Corporation to FCC Counsel

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Attachment 2 - Omitted

Florida Cellular's Amendment to its Ownership Exhibit

Attachment 3 - Omitted

Corporate Records of Florida Cellular Mobil Communications Corporation Concerning Stock Held By Richard and Susan Finn

FILED
FEB 27 1995

No. 94-1128

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission reasonably adhered, on the facts of this case, to its general policy of strict enforcement of the rules governing applications for licenses to provide cellular communications services in rural areas.

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 28 F.3d 191. The Federal Communications Commission's final order (Pet. App. 18a-23a) is reported at 7 F.C.C.R. 7856. A prior Commission order (Pet. App. 24a-28a) is reported at 6 F.C.C.R. 6910, and the decision of the Commission's Mobile Services Division (Pet. App. 29a-33a) is reported at 6 F.C.C.R. 354.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1994. Pet. App. 36a. A petition for rehearing was denied on September 28, 1994. Pet. App. 34a, 35a. The petition for a writ of certiorari was filed on December 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission licenses private parties to construct and operate cellular communications systems in various service areas defined by the Commission. Pet. App. 2a. In order to streamline the licensing process and provide cellular services to the public as quickly as possible, the Commission generally awards licenses through a lottery process. *Id.* at 3a; see, *e.g.*, *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) 1029, 1037 (1986). Each facially complete application for a particular service area is included in the lottery, and the Commission does not review the applications until the lottery has produced a tentative winner. At that point, the Commission reviews the selected application to determine whether it complies fully with the Commission's rules and regulations. If it does not, it will be dismissed. If it appears to comply, the Commission gives public notice of the tentative selection, and competing applicants then have the opportunity to challenge the result by filing petitions to deny the application. Pet. App. 3a-4a.

In its initial rules, which governed applications to serve metropolitan service areas, the Commission prohibited direct or indirect cross-ownership among license applicants, but ignored any interest of less than

one percent in any applicant. Pet. App. 2a; see 47 C.F.R. 22.921(a) and (b). Based on its experience with that rule, however, the Commission concluded that any cross-ownership ultimately delayed the inauguration of service to the public. Pet. App. 4a-5a. In 1988, the Commission adopted rules prohibiting any cross-ownership of applicants for licenses to provide cellular service in rural areas, and prohibiting the prelicensing transfer of interests in rural license applications. See 47 C.F.R. 22.921(b), 22.922(a).

2. Petitioner was organized in 1983 for the purpose of applying to provide cellular communications services in various metropolitan service areas. Pet. App. 5a. Petitioner later decided to apply for licenses to serve rural areas instead. *Id.* at 6a. During 1988, petitioner sent its shareholders several notices concerning its new plans, and explaining the Commission's new filing rules prohibiting any cross-ownership of competing applicants for rural licenses. *Ibid.*; see 47 C.F.R. 22.921(b).

In 1984, Yerger Yandell, one of petitioner's shareholders, moved to a new residence without notifying petitioner of his new address. Pet. App. 5a. As a result of the move, Yandell did not receive any of petitioner's periodic notices to shareholders. *Id.* at 6a. At least one notice was returned to petitioner marked "Unable to deliver—no forwarding address." *Ibid.* Yandell's new residence was about three blocks from his old one, and he remained listed in the local telephone directory. C.A. App. 89.

In December, 1988, petitioner filed an application seeking authority to construct and operate a new cellular radio system in a rural service area designated Maryland 2, comprising much of southern Maryland and the Eastern Shore region. Pet. App. 6a.

At the time petitioner filed its application, Yandell owned a five percent interest in a competing applicant for the Maryland 2 license. *Ibid.* In November, 1989, petitioner's application was chosen in the Maryland 2 lottery. *Ibid.*

Following its selection, petitioner updated its shareholder mailing list and obtained Yandell's new address. Pet. App. 6a. Petitioner thereafter notified shareholders, including Yandell, that it had been selected in the Maryland 2 lottery. *Ibid.* Yandell then informed petitioner of his interest in a competing applicant for the Maryland 2 license, and petitioner in turn disclosed Yandell's cross-ownership to the Commission. *Ibid.* Shortly thereafter, another applicant for the Maryland 2 license filed a petition to deny petitioner's application, arguing that the application violated the rule against cross-ownership. *Id.* at 7a.

The Chief of the Commission's Mobile Services Division agreed that Yandell's dual interests violated the cross-ownership prohibition of 47 C.F.R. 22.921(b), refused to waive application of that rule in petitioner's case, and dismissed petitioner's application. Pet. App. 29a-33a. The Commission affirmed that decision, both on review of the Mobile Services Division order (*id.* at 24a-28a) and on later reconsideration of its own decision (*id.* at 18a-23a). The Commission rejected petitioner's argument that it did not intend to violate the cross-ownership rule, pointing out that while the rule is intended in part to deter speculation, "its underlying intent is to assist the Commission in processing applications quickly and efficiently so that service might be available to the public as expeditiously as possible." *Id.* at 21a-22a. In the Commission's view, the rule could not be

efficiently applied if a fact-specific analysis of intent were required. *Id.* at 22a.

The Commission also found no reason to waive a cross-ownership violation apparently caused by petitioner's error in "not diligently tracking [its] assorted potential cross-interests" (Pet. App. 22a), particularly in light of petitioner's ability to reach Yandell after it won the lottery (*ibid.*) and its failure to "show[] that it [had taken] sufficient affirmative steps to ensure that none of its shareholders had filed another application" (*id.* at 26a). Under the circumstances, the Commission concluded that granting a waiver to petitioner would "seriously undercut general compliance and enforcement efforts." *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 1a-17a. The court observed that the Commission's rules clearly prohibit multiple ownership interests in competing applicants, and that applicants have long been on notice that submitted applications are subject to dismissal, without any opportunity for curative amendments, if they contain any disqualifying defect. *Id.* at 3a, 12a-13a. The court concluded that in light of the Commission's experience with the more lenient cross-ownership rule applied to applications for cellular licenses in metropolitan service areas, the Commission had permissibly changed its rules to prohibit any cross-ownership among applicants for rural licenses. *Id.* at 8a-10a. In addition, the court held that the Commission did not abuse its discretion or deny petitioner due process when it refused to waive the cross-ownership rule. Noting petitioner's "failure to exercise due diligence in keeping track of its shareholders" (*id.* at 16a), the court upheld the Commission's ability to require strict compliance with its

rules when it permissibly concludes that waiver "would hinder the administrative process and * * * slow the provision of service to the public" (*id.* at 15a).

ARGUMENT

1. Petitioner's argument is based on the premise that the Commission and the court of appeals imposed "strict vicarious liability" on a wholly innocent corporation, in violation of the Due Process Clause of the Fifth Amendment. Pet. 7-13; see Pet. i. Petitioner does not explain its use of terms appropriate to the imposition of money damages for tortious conduct to discuss a regulatory agency's decision to promulgate and enforce strict qualification standards in the process of allocating access to scarce public resources. Leaving that point aside, however, the facts in this case do not implicate the question that petitioner seeks to present. As the court of appeals pointed out (Pet. App. 16a), "the Commission did not find [petitioner] completely blameless for the violation." See also *id.* at 22a, 26a.

The record supports that conclusion. At least one piece of mail sent to Yandell was returned to petitioner marked "Unable to deliver—no forwarding address," and petitioner admits that it knew Yandell had moved prior to the filing of its Maryland 2 application. Pet. App. 6a, 16a; Pet. 18. As both the court and the Commission noted (Pet. App. 16a, 22a), petitioner's ability to locate Yandell, who had moved only three blocks and who remained listed in the local telephone directory (C.A. App. 89), after winning the Maryland 2 lottery "suggests that it could have done so earlier to avoid a cross-ownership violation." Pet. App. 22a. Under the circumstances, the court of

appeals held (*id.* at 16a) that "the Commission could conclude that the company's failure to exercise due diligence in keeping track of its shareholders was at least partly to blame for the rules violation that resulted in the dismissal of [petitioner's] application." That proper and fact-bound determination does not merit further review, and obviates any need to consider petitioner's general arguments concerning "strict vicarious liability." *

2. Nor is any legal issue presented in this case concerning petitioner's entitlement to "clear and unambiguous notice of the requirements that must be met" in connection with license applications. Pet. 12. The court of appeals correctly held that petitioner received such notice. Pet. App. 12a-13a. As the court observed (*id.* at 12a), the notices petitioner mailed to its shareholders "indicate conclusively that [petitioner] had actual notice" of the cross-ownership rule, and the Commission's other rules and orders "also provided notice that applications would be subject to dismissal for failure to comply with the [Commission's] rules and regulations." See also *id.* at 3a-4a, citing *Cellular Lotteries (Further Reconsideration)*, 59 Rad. Reg. 2d (P & F) 407, 410 (1985), and 47 C.F.R. 22.20(a)(2).

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* Petitioner's challenge to the Commission's statutory authority to impose "vicarious liability" (Pet. 10-13), and its related argument that the Commission's rules are ambiguous with respect to the prohibition of cross-ownership and the consequences of a violation (Pet. 18-19), were neither presented to nor addressed by the court of appeals. They cannot properly be raised for the first time in a petition for review by this Court. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam).

Because petitioner had adequate notice of the Commission's rules and the likely consequences of any failure to comply with them, the court of appeals properly concluded (Pet. App. 13a-15a) that the Commission did not abuse its discretion by refusing to waive the cross-ownership prohibition or to allow petitioner to cure its violation after the fact. The Commission has reasonably determined that the requirement that license applicants be qualified at the time their applications are originally filed, without the time, expense, and complication of processing subsequent curative amendments, is critical to the Commission's efforts to expedite the cellular licensing process. See, *e.g.*, *Moving Phones Partnership* v. *FCC*, 998 F.2d 1051, 1057 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1369 (1994); *Progressive Cellular III B-3*, 6 F.C.C.R. 7178 (1991), aff'd mem., 986 F.2d 546 (D.C. Cir.) (Table), cert. denied, 114 S. Ct. 174 (1993). The Commission's strict application of its very limited criteria for waiver to the facts of petitioner's case (see, *e.g.*, Pet. App. 26a-27a) reflects a permissible balancing of competing policy concerns, and warrants no further review.

3. Finally, petitioner contends (Pet. 14-17), on constitutional (rather than statutory) grounds, that the cross-ownership rule is not rationally related to the achievement of legitimate Commission objectives. Even if we assume that that argument was properly presented to the court of appeals (compare Pet. App. 15a-16a; Pet'r C.A. Br. 42-47), it is insubstantial.

To begin with, petitioner has no constitutionally protected interest in having cellular licenses awarded according to any particular set of rules. Such an interest does not arise from an abstract need or desire for a benefit that might be conferred by the govern-

ment; it requires some legitimate claim of entitlement. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Such a claim may arise from rules or explicit understandings. See *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972). No such rule or understanding exists in this case. The Commission's rules and practices requiring strict compliance with the prohibition of cross-ownership apply to all license applicants. Moreover, even in the case of licenses already granted, this Court has recognized the clear congressional policy that "no person is to have anything in the nature of a property right as a result of the granting of a license." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 331 n.6 (1945), quoting *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). As the tentative winner of a selection lottery, whose application was explicitly subject to subsequent review for compliance with all of the Commission's rules, petitioner has even less claim to a protected property interest. See, *e.g.*, Pet. App. 3a-4a; *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175 (1984) (license issued only after review of application).

If we again assume that petitioner is entitled to challenge the substance (rather than the application) of the license selection procedures chosen by the Commission, its argument is addressed primarily to only one of the purposes of the cross-ownership rule, the deterrence of speculation in license applications. Pet. 14-15. As the court of appeals pointed out (Pet. App. 4a-5a, 14a-15a), however, the rule is also aimed at facilitating the delivery of cellular service to the public by eliminating delays associated with multiple ownership. As the court explained (*id.* at 4a), the Commission's experience with metropolitan area licensing led it to conclude "that allowing multiple

ownership interests of less than 1% in competing cellular applications encouraged applicants to enter into partial settlements whereby the applicants made mutual promises to convey a portion of their interests to other members of the settlement group upon being selected as the tentative selectee." *Ibid.* (footnote omitted). Such agreements not only involved speculation, but "delayed the inauguration of service to the public because they encouraged losing applicants to file petitions to deny the winning applications alleging that the tentative selectees were not the real parties in interest." *Ibid.* Petitioners suggest no adequate reason (see Pet. 16-17) for overruling the Commission's considered judgment, based on its experience and upheld by the court of appeals, that the cross-ownership rule is a rational means of furthering the Commission's goal of speeding the identification of appropriate licensees, and therefore ultimately the provision of services to the public.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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